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JUDGES OF THE HIGH COURT.

JULY—DECEMBER, 1925.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE REILLY.

N. M. Rayulu Aiyar, Nagasami Aiyar and Co. represented by N. M., Nagasami Aiyar ... *Appellants** (*Plaintiffs*)

v.

Thirukonda M. Kuppu Aiyar and Sons, by one of its partners, M. K. Ramier ... *Respondents* (*Defdts.*).

Contract—Breach of—Anticipatory breach by buyer—Repudiation by way of—Effect—Liability for damages in case of such breach. Rayulu Aiyar v. Kuppu Aiyar & Sons.

On 20th August, 1918, a contract was made between the plaintiffs and the defendants to the effect that the plaintiffs should supply to defendants at Madura 50 bales of 20 count yarn from the Pedlad factory, each bale to contain 20 bundles and each bundle to weigh 10 lbs., and that defendants should take delivery of the bales on payment at the rate of Rs. 21 a bundle, that is, Rs. 420 a bale. No time being fixed for the performance of the contract by plaintiffs, plaintiffs were under a duty to supply the 50 bales within a reasonable time. By their notice plaintiffs informed defendants on 23rd September, 1918, that 20 bales were ready for delivery at Madura and by another notice on 21st October, 1918, that the remaining 30 bales were ready for delivery there. Defendants took delivery of 5 bales out of the first lot of 20 bales on 5th October, 1918, and of 5 other bales out of the same lot of 20 on 14th October, 1918. Defendants did not take delivery of the remaining 10 bales of the first lot of 20 bales or of the second lot of 30 bales; they did not even inspect those 40 unaccepted bales nor did they send to plaintiffs any written communication about them.

In a suit for damages for non-acceptance of goods brought by plaintiffs against defendants, there was evidence to show that out of the 10 bales of which defendants had taken delivery some of the yarn was not of the contract description. There was, however, no evidence to show whether the 40 bales in

*Appeal No. 96 of 1925. 19th August, 1924.

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question were not of the contract description, and all that appeared was that plaintiffs tendered them in performance of their part of the contract and that defendants failed to accept them and even to inspect them and merely ignored the tenders. It further appeared that, even if the 40 bales in question had not been of the contract description, and the defendants had rejected those bales on that ground, the plaintiffs would have had time to supply other bales in place of those rejected ; and on the evidence it could not be assumed that they would have found it impossible or even difficult to do so.

Held, that from the evidence that a comparatively small part of the 10 bales accepted by the defendants was not of the contract description, no inference could be drawn regarding the other 10 bales of the first lot of 20 or regarding the 30 bales of the second lot ; and that defendants by their conduct refused to accept the 40 bales tendered by plaintiffs without even troubling to inspect them or to ascertain whether they were or were not of the contract description and were thereby guilty of breach of contract for which plaintiffs were entitled to damages.

Appeal against the decree of the Court of the First Additional Subordinate Judge of Madura in O. S. No. 22 of 1920.

A. Krishnaswami Aiyar for appellants.

C. V. Ananthakrishna Aiyar for respondents.

The Court delivered the following

Ramesam, J.

JUDGMENTS :—*Ramesam, J.*:—This appeal arises out of a suit for damages for non-acceptance of goods agreed to be sold to defendants by plaintiffs. The Subordinate Judge dismissed the suit. The plaintiffs appeal.

The plaintiffs and defendants are merchants of Madura dealing in yarn and cloth. On 20th August, 1918, Ex. A was executed for the purchase of 50 bales (each of 20 bundles) of "double deer yarn (Palukka)" at Rs. 21 per bundle, the defendants being represented by broker K. M. Nagasami Iyer. Ex. I is the corresponding entry in defendants' Chitta of the same date. Rs. 100 was paid as earnest money and Rs. 25 was to be paid as advance for each bale. Ex. B is the letter of plaintiffs, dated 24th August, 1918, acknowledging the receipt of Rs. 1,250 as advances and promising to intimate the arrival of the bales from Bombay. It shows that the bales contracted for were out of the bales ordered for by the plaintiffs' Bombay firm from the dyeing factory at Pedlad.

The plaintiffs got Pedlad yarn from Bombay in September 1918. On the 23rd September, by Ex. C, plaintiffs gave intimation to defendants that they had 20 bales ready for delivery out of those contracted for in August. Answer 2

to the interrogatories served on the plaintiffs shows that 50 bales arrived in Bombay on 14th August and they arrived in Madras in September ; 30 bales on 18th and 20 bales on 22nd September. The defendants waited for some time and took delivery of 5 of the bales on 5th October and another 5 of the bales on 14th October. The plaintiffs gave notice by Ex. D, dated 21st October, 1918, that the remaining 30 bales (according to the contract Ex. A) were ready for delivery. The defendants did nothing. By Ex. E, dated 7th January, 1919, the plaintiffs gave notice that if the balance of 40 bales were not received, they would be sold at defendants' risk. There was no reply from the defendants. The plaintiffs alleging that the goods have been sold on 9th March, 1919, and after a further notice, dated 27th March, 1919, (Ex. F.), filed the present suit on 6th August.

From the above history of the case it is clear the defendants' attitude was one of silence. The reason for this was obviously the continuously falling market which was conceded and assumed by both parties in the argument before us. The defendants must be regarded as having broken the contract without giving any reason for the breach.

In the written statement their plea is that, after the goods were accepted on 5th October, 1918 and 14th October, 1918, some of the said bales were opened and it was found that "the packets are not those of 10 lbs. weight which the parties agreed to supply to the defendants. Nor is the yarn of 20 counts. They are of the 8 1|2 lbs. weight" . . . "that matter was reported by the defendants to the plaintiffs on 17th October, 1918 and the contract was cancelled." These sentences, I have quoted, practically constitute the whole defence. It is clear from this that, so far as the balance of 10 bales offered by Ex. C, and not accepted and the 30 bales offered by Ex. D, there is no other defence except the cancellation of the contract. But, at the time of the first hearing, the defendants raised only the third issue, viz., whether the goods tendered were not of the description in the agreement dated 4th August, 1918 and no issue was raised about cancellation of the contract by mutual consent.

To prove their plea on the 3rd issue, the defendants produced one of the bundles out of the bales supplied to them and this was tested by an expert to whom it was sent by the Court. He examined 12 skeins (1 skein = 120 yards ; 1 hank = 7 skeins =

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840 yards. A bundle contains 10 packets. A packet weighs 1 lb. The number of hanks in a packet determines the count. If there are 20 hanks in a packet so that the weight of a hank is 1 lb. by 20 and the weight of a skein is 1000 grains by 20, or 50 grains, the count of the yarn is 20. If the skein weighs less, the count is higher.) The expert found in the present case that the average of the weight of the skeins examined by him is 40.8 grains and the count is therefore 24.4. When we remember that a bale consists of 20 bundles, or 200 packets or (according to the average of the expert) 4,880 hanks or 34,160 skeins, it is difficult to regard an examination of 12 skeins as a test of 34,160 skeins. If a bale is of the right kind of yarn of No. 20 count it ought to contain 4000 hanks or 28,000 skeins. Even if one may assume that the bale out of which the 12 skeins examined by the expert is all of yarn of an average 24.4 count, it is difficult to assume that the other nine bales contained yarn of the same average count. Even the 12 skeins examined by the expert show considerable variety ranging from 23.2 to 25.5.

We are not dealing with the 10 bales accepted and paid for by the defendants. We are informed as to those, a separate suit has been filed by the defendants for breach of warranty.

But as to the other 40 bales the Sub-Judge, having regard to the fact that the 10 bales actually delivered did not contain yarn of No. 20 count and seeing that plaintiffs have not produced samples of packets from the 40 bales, held that the plaintiffs have not proved that the 40 bales answered to the description in the contract and found the issue against plaintiffs. He also held that there is no proof that the goods were from Pedlad factory. As to this, it is enough to observe that no such plea was raised in the written statement even as to the 10 bales delivered and the only complaint made related to the count and weight.

On these facts the plaintiffs' vakil first contended that the goods tendered in pursuance of Ex. C complied with the terms of the contract. He relied on the evidence of P. W. 2 and D. Ws. 2 and 3 and sought to draw the following inferences: —That the Pedlad factory was only turning out one kind of orange-dyed yarn marked count 20, a bundle of which is marked as weighing 10 lbs. That, as a matter of fact, its count is not exactly 20 but over it. That, for all practical purposes,

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counts from 20 to 25 are regarded as the same by the people who deal in them. That, the subject of the contract before us, is really not yarn of exactly 20 counts or bundles of 10 lbs. but what the Pedlad factory was turning out with labels of 20 counts and 10 lbs. I have a strong suspicion that this contention of the appellants is probably true, but unfortunately the pleadings have not been framed on such a basis. As soon as the defendants pleaded that the goods delivered on 5th and 14th October did not answer to the description in the contract, the plaint must have been suitably amended or the issues should have been made to cover what the plaintiffs now suggest. This was not done. Another difficulty is that the evidence is far too meagre to justify findings in favour of the appellants. The point raised by them requires that more persons engaged in the trade should be examined to prove the trade usage. Incidentally, I am also constrained to observe that evidence is not recorded so as to make the evidence intelligible. For instance, I would refer to P. W. 2. "His master 'sells count No. 20.' The packet goes by the name of 10 lbs. packet. There is no other goods of that denomination." Now seeing that a packet of count 20 must weigh 10 lbs., the words "goes by the name of" are meaningless. Nor can there be other goods of that denomination. What was meant was: 'A yarn marked "count 20" whether it is really that count or not is the only thing available in the market and there is no other; if we find it actually to be count 24.4 this does not matter. This is all that is known as count 20 and 10 lbs. weight.' This meaning is not brought out in the deposition. Similar sentences in the evidence of D. W. 1 and D. W. 3 are similarly recorded. But, as I said, on the pleadings and the meagre evidence, it is not possible to record the finding the appellants require. One can only hope that he will gain by this experience in the other case.

The next question is: whether the defendants, by their breach in not taking delivery of the other 10 bales (relating to Ex. C) after accepting the first ten bales and not caring to respond to the offer in Ex. D, have committed such a breach of the contract as to amount a waiver of all conditions precedent binding on the plaintiffs. The appellants rely on *Braithwaite* v. *Foreign Hardwood Co.* (1). In that case there was a repudiation by the defendants on

1. (1905) 2 K B 543.

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October 5 long before the goods arrived. The Bill of Lading arrived in October 30, and the plaintiffs not accepting the repudiation by the defendants (dated 5th October) tendered two Bills of Lading to the defendants who refused to accept it or pay for the rosewood comprised in it. The goods arrived on November 9, and were sold by the plaintiffs as against the defendants. Collins, M. R. said with reference to the second repudiation at p. 551 : "In my opinion that act of the defendants amounted in fact to a waiver by them of the performance by the plaintiffs of the conditions precedent which would otherwise have been necessary to the enforcement by him of the contract which I am assuming he had elected to keep alive against the defendants notwithstanding their prior repudiation, and it is not competent for the defendants now to hark back and say that the plaintiff was not ready and willing to perform the conditions precedent devolving upon him, and that if they had known the facts they might have rejected the instalment when tendered to them. The defendants are not in a position now, by reason of their after-acquired knowledge, to set up a defence which they previously elected not to make. We must in such a case look to see whether, at the time of each alleged breach, each side was ready and willing to perform the conditions of the contract which it lay upon them to perform, and there was clearly a breach by the defendants, for they had by their own act absolved the plaintiff from the performance of the conditions of the contract." Mathew, L. J. said at page 554 : "But they repudiated the whole contract and by so doing clearly absolved the plaintiffs from the performance of conditions precedent which in the ordinary course he would have been obliged to perform." Cozens-Hardy, L. J. agreed. Mr. Ananthakrishna Aiyar, who appeared for the defendants, contended that *Braithwaite's case* (1) cannot apply for two reasons : (1) In that case there was an express repudiation on the 5th October, and at or about October 30th; (2) the anticipating breach of 5th October is the crux of that case ; the case was also disapproved by the House of Lords. As to the first point, the distinction sought somewhat resembles the distinction sought to be made out in *Taylor* v. *Oakes, Roncoroni and Co.* (2). Bankes, L. J. says at page 271 : "But Mr. Merriman seeks to distinguish this case by endeavouring to convince us that a distinction must be drawn where the repu-

1. (1905) 2 K B 543. 2. (1922) 127 L T 267.

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diation consists of a curt and impolite disclaimer of the existence of a contract and a very polite statement that, under circumstances over which the buyer has no control, he is unable to take the goods." Mr. Ananthakrishna Aiyar's distinction is not between 'impolite' and 'polite' repudiation but between "express" and "implied" repudiation. The implied repudiation by silence resembles a 'polite' repudiation. But it stands on the same footing as an express repudiation. The second point raised by him requires more careful consideration. It is clear that, according to Collins, M. R., the contract was kept alive up to October 30, by the plaintiff's non-acceptance of the earlier repudiation and the waiver of the conditions precedent is the result of the later act. Mathews, L. J. seems to be of the same opinion though his view is not very explicit. In *Taylor* v. *Oakes, Roncoroni and Co.* (2), Greer, J. seems to have felt some difficulty as to the application of *Braithwaite's case.* His view seems to be that, if specific goods were actually tendered on the second occasion and were not substantially of the kind contracted for, the defendants in *Braithwaite's case* (1) would not have been liable. For this view, he relies on *Ridgway* v. *The Hungerford Market Company* (3) and *Boston Deep Sea Fishing and Ice Company* v. *Ansell* (4) which are cases of master and servant and thinks that the principle applies equally to a contract for the sale of goods. He gets over the difficulty by explaining that, in *Braithwaite's case* (1) the second offer by plaintiff was not an actual tender of the goods but a mere offer to tender them and therefore the offer is not an actual breach of contract. One may observe here that the second offer is of the actual Bills of Lading relating to certain specific goods on the 'Spheroid' and the goods were not only ascertainable but were afterwards identified and their nature known. I confess that the difficulties in understanding *Braithwaite's case* (1) are not solved by Greer, J.'s explanation of it. On appeal, Scrutton, L. J. and Atkin, L. J. refused to be drawn by Greer, J. into a discussion of *Braithwaite's case* (1). They were of opinion that, on the facts of the case before them, the point did not arise. In that case, by letters which passed between the parties in December, the defendants stopped delivery of the balance of the goods and refused to accept them. There was neither tender of specific goods, nor tender of a Bill of Lading relating to actual speci-

1. (1905) 2 K B 543.
2. (1922) 127 L T 267.
3. 3 Ad & Ell 171.
4. (1888) L R 39 Ch D 339.

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fic goods, the nature of which was afterwards known. Such a repudiation was held to be 'anticipatory.' Bankes, L. J. said: "It seems to me, after the decision in *Braithwaite's case* (1) which binds this Court, that where there has been a repudiation by way of anticipatory breach, etc." His view seems to be that the second repudiation in *Braithwaite's case* (1) is also an anticipatory breach, and he agreed with Greer, J.'s view—a point into which the other Lord Justices refused to be drawn. According to them, on the facts, it was a clearer case than *Braithwaite's case* (1) and that was enough. In my opinion the present case is a *a fortiori* case and the difficulties in understanding *Braithwaite's case* (1) need not affect it. It is, in my opinion, on all fours with the facts of *Taylor* v. *Oakes, Roncoroni and Co.* (2).

The next case I need discuss is *British and Beningtons, Ltd.* v. *N. W. Cachar Tea and Co.* (5). Only Lord Atkinson and Lord Sumner delivered judgments. Lords Buckmaster and Carson agreed with Lord Sumner. Lord Wrenbury merely concurred. On the disposal of the case before them, there was no difference of opinion. It was only about the proper interpretation of *Braithwaite's case* (1) that Lord Sumner thought some criticism had to be made. Lord Atkinson after pointing out that 'readiness and willingness' includes the capacity to perform [citing Lord Abinger in *De Medina* v. *Norman* (6)] proceeds to cite Lord Mansfield in *Jones* v. *Barkley* (7) and Lord Campbell in *Cort* v. *Ambergate, etc., Ry. Co.* (8) for the position that the condition of "readiness and willingness" is satisfied by the offer of the plaintiffs to perform. The latter case is of a case of 'railway chairs' which were not actually made but which presumably could be made at short notice. He then refers to *Braithwaite's case* (1) and quotes Collins, M. R.'s opinion with approval. Lord Mansfield's sentence in the case of *Jones* v. *Barkley* (7) was then quoted: "The party must show he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go further." Lord Sumner, after remarking at p. 70 that the decision in *Braithwaite's case* (1) is not quite easy to understand and that his recollection of it is not

1. (1905) 2 K B 543. 2. (1922) 127 L T 267.
5. (1923) A C 48. 6. (1842) 9 M & W 820 at 827.
7. (1781) 2 Doug (K B) 684 at 694. 8. (1851) 17 Q B 127 at 143 and 144.

as clear as Scrutton, L. J.'s (both appeared in the case), says at p. 71 : "Furthermore, it does not anywhere appear that, even if the first cargo might rightly have been rejected, the seller could not have found another exactly conforming with the contract, which he might have duly tendered and so have put himself right." This sentence shows that, far from disagreeing with *Braithwaite's case* (1), Lord Sumner applies its principle and does not go in favour of the defendants, even as far as Greer, J. in the *Law Times* case. The only reservation he makes is : "If the sellers had become wholly and finally disabled from performing essential terms of the contract altogether" at the time of breach, such a fact is open to the defendant in defending a suit for damages, though he did not state it at the time of the repudiation and this is all that he could have meant when earlier he said : "If he had repudiated, giving no reason at all, I suppose all reasons and defences in the action, partial or complete, would be open to him." He then adds, "What he says is, of course, very material upon the question whether he means to repudiate at all, and, if so, how far, and how much, and on the question in what respects he waives the performance of conditions still performable in future or dispenses the opposite party from performing his own obligations any further" (page 72).

In my opinion Lord Sumner has not dissented from *Braithwaite's case* (1) and the last case is good law. The present case is a clearer case. There is no evidence to show the nature of the goods in the 10 bales (offered by Ex. C but not received by the defendants) and in the 30 bales (offered by Ex. D). I cannot assume in favour of the defendants that the yarn in these bales is of 24 count only. The only reason for such an assumption is that no other yarn (orange dyed at Pedlad) exists—an assumption I refused to make at an earlier stage of the case in favour of the appellant. I must assume that Pedlad factory can supply all counts of yarn (orange dyed) and it does not follow from the fact that the 10 bales accepted on 5th and 14th October are of 24 count, that the other bales which have never been identified since could be only of 24 count and the 30 bales offered by Ex. D would also turn out to be of 24 count. It follows that plaintiffs were always not only willing to perform the contract but if, at any

1. (1905) 2 K B 543.

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time, the goods they delivered turned out not to be of the correct kind could have set it right. All conditions were waived by the defendants by their repudiation. In this case there is no evidence to support any suggestion that the plaintiffs were totally unable and disabled to perform the contract altogether.

It follows that plaintiffs are entitled to a decree for damages in respect of the 40 bales.

On the terms of Ex. B, the dates of breach were 23rd September, 1918 (for the 10 bales) and 21st October, 1918 (for the 30 bales) and it is not open to the plaintiffs to argue that the breach was at a later date. On the 23rd the price was Rs. 19 per bundle. We have nothing to do with the results of the re-sale in March. It follows that plaintiffs are entitled to a decree for 200 x 2 *plus* 600 x 5-14-0, *i. e.,* 3,925 *minus* Rs. 1,000 (given as advance), *i. e.,* Rs. 2,925 with subsequent interest at 6 per cent. up to this date and 6 per cent. on the aggregate amount from this date to the date of payment, getting and paying proportionate costs throughout.

Reilly, J.

Reilly, J. :—It is admitted that the contract with which we are concerned in this case was made on 20th August, 1918 and was to the effect that plaintiffs should supply to defendants at Madura 50 bales of 20 count yarn from the Pedlad factory, each bale to contain 20 bundles and each bundle to weigh 10 lbs.; and that defendants should take delivery of the bales on payment at the rate of Rs. 21 a bundle, that is Rs. 420 a bale. Defendants pleaded that one of the terms of the contract was that the 50 bales should be delivered within a month from the date of the contract. An issue was framed on that plea but was not pressed by defendants at the trial. The Subordinate Judge's finding in effect was that no time was fixed for the performance of the contract by plaintiffs. It was therefore plaintiffs' duty to supply the 50 bales within a reasonable time. There is undisputed evidence that by their notice, Ex. C, plaintiffs informed defendants on 23rd September, 1918 that 20 bales were ready for delivery at Madura and by Ex. D on 21st October, 1918, that the remaining 30 bales were ready for delivery there. Defendants took delivery of 5 bales out of the first lot of 20 bales on 5th October, 1918 and of 5 other bales out of the same lot of 20 on 14th October, 1918. Defendants did not take delivery of the remaining 10 bales of the first lot of 20 bales or of the second lot of 30

bales : they did not even inspect these 40 unaccepted bales nor did they send to plaintiffs any written communication about them.

There is evidence that out of the 10 bales of which defendants took delivery some of the yarn was not of the contract description. D. W. 2, a weaver, has given evidence that he bought 10 bundles of this yarn from defendants and found it to be 24 count yarn, not 20 count. D. W. 3, another weaver, says that he bought 10 or 20 bundles of the yarn and found it to be 24 count yarn. There is also expert evidence that a bundle from one of the 10 bales accepted by defendants was found to contain yarn of 24 counts or 26 counts, according as the dye was taken into consideration or not, and that the bundle weighed only 8 1|2 lbs. instead of 10 lbs. D. W. 1, the manager of defendants' firm, says that he complained on 17th October, 1918 to Rayulu, the senior partner of plaintiffs' firm (who died before the trial) that the yarn in the 10 bales accepted was not of the contract description and cancelled the order for the remaining 40 bales, to which cancellation Rayulu agreed. The Subordinate Judge says in his judgment that there is good ground for believing that D. W. 1 complained to Rayulu about the yarn, but that he does not believe that the contract was cancelled by consent, as alleged by D. W. 1. It has been argued here for plaintiffs that D. W. 1's evidence that he complained to Rayulu about the yarn should not be believed at all, as no question about this was put at the trial to plaintiffs' two gumasthas, P. Ws. 1 and 2, who are said by D. W. 1 to have been present at his conversation with Rayulu. Mr. Ananthakrishna Aiyar for defendants has said nothing about this part of the case, and I think that D. W. 1's evidence that he complained about the yarn to Rayulu may be disregarded.

It appears that there was another suit between the parties in respect of the 10 bales accepted by defendants. In this suit plaintiffs claim damages for breach of contract in respect of the remaining 40 bales. It is contended for defendants that no damages are due from them as the 40 bales was not of the contract description and in effect therefore it was plaintiffs who were guilty of breach of contract in respect of these bales. It is admitted that defendants never even inspected the 40 bales, and the evidence offered in support of this contention is that which I have mentioned to the effect that some

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of the yarn and one of the bundles in the 10 bales which they accepted were not of the contract description. I agree with my learned brother that from the evidence that a comparatively small part of the 10 bales accepted by defendants was not of the contract description, we cannot infer anything regarding the other 10 bales of the first lot of 20 or regarding the 30 bales of the second lot. It is true that in the course of arguments here and also before the Subordinate Judge a contention has been put forward for plaintiffs that the subject of the contract was, not bales of yarn, literally of the contract description, but bales of yarn commercially known under that description but actually varying from it. The evidence to which plaintiffs' vakil points to support this contention is clearly insufficient and there is no mention of such a contention in the pleadings. I think this contention must be regarded as a false move in argument, for which plaintiffs cannot be penalised. On the evidence we do not know whether the 40 bales in question were of the contract description or not. All we know is that plaintiffs tendered them in performance of their part of the contract and that defendants failed to accept them and even to inspect them and merely ignored the tenders.

But, even if we assume for the sake of argument that the 40 bales in question were not of the contract description, the defendants' position is not really improved. As no time has been fixed for the delivery of the bales by plaintiffs, if defendants had inspected these 40 bales and had then found that they were not of the contract description, plaintiffs would have had time to supply other bales in place of those rejected and on the evidence there is no reason to suppose that they would have found it impossible or even difficult to do so.

It is clear that defendants by their conduct refused to accept the 40 bales tendered by plaintiffs without even troubling to inspect them or to ascertain whether they were or were not of the contract description. Defendants were therefore guilty of breach of contract, for which plaintiffs are entitled to damages. In the circumstances I do not think it is necessary for plaintiffs to call in aid the decision in *Braithwaite's case* (1). But I may add that in my opinion the weight of the decision in *Braithwaite's case* (1) as an exposition of law has not been affected by either of the later cases mentioned before us. As I understand it, the principle of *Braithwaite's*

1. (1905) 2 K B 543.

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case (1) is that, if *A* contracts to buy goods of a certain description from *B* and refuses for other reasons to accept goods tendered by *B* as in performance of the contract he cannot escape liability to pay damages by proving afterwards that the goods tendered were not of the contract description. It is true that Lord Sumner in *British and Beningtons, Ltd.* v. *N. W. Cachar Tea Company and others* (5) and Greer, J. in *Taylor* v. *Oakes, Roncoroni and Co.* (2) interpreted the decision in *Braithwaite's case* (1) more narrowly ; but their remarks, though to be treated of course with the greatest respect, were *obiter dicta*. On the other hand Lord Atkinson in *British and Beningtons, Ltd.* v. *N. W. Cachar Tea Company and others* (5) interpreted *Braithwaite's case* (1) in effect as I have stated it. But in the present case, as it has not been proved that the 40 bales in question were not of the contract description, and as, even if they were not of that description, plaintiffs had still time to supply others in their stead, the exact interpretation of *Braithwaite's case* (1) does not appear to me of immediate importance to us.

The damages to which plaintiffs are entitled are the difference between the contract price of the 40 bales and the market price on the dates of the breach less Rs. 1000 paid by defendants in advance for those bales. According to Ex. B defendants were to take delivery on the day on which they received intimation of the arrival of the bales, and in the plaint the dates of breach in respect of the two lots of bales have been given as 23rd September, 1918 and 21st October, 1918. Although plaintiffs allowed defendants some time for the removal of the bales and might reasonably do so and although defendants were very dilatory in taking delivery of those bales which they accepted, I do not think plaintiffs can now contend that the breach in each case should be assumed to have occurred at some later date and so increase the amount of damages due to them. I agree that the damages to which they are entitled are the difference between the contract price for 10 bales and the market price for 10 bales on 23rd September, 1918 *plus* the difference between the contract price for 30 bales and the market price for 30 bales on 23rd October, 1918 *minus* the Rs. 1000 paid in advance. On principle I should prefer not

1. (1905) 2 K B 543. 2. (1922) 127 L T 267.
5. (1925) A C 48.

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to allow interest on the amount so calculated before the date of the suit; but I do not wish to differ from my learned brother on that comparatively minor point. I agree that the parties should pay and receive proportionate costs in both Courts.

A. S. V. *Decree varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Sutrame Govinda Rao ... *Appellant** (*Plaintiff*)

v.

Anugodu Matada Rudrayya and others ... *Respts.* (*Defts.*)

Govinda Rao v. Rudrayya.

Civil Procedure Code, S. 11, *Expl.* (*iv*)—*Set-off—Equitable set-off—Omission to plead—Effect—Principal and agent—Agent's suit against principal—Principal's claim to damages arising out of same transaction—Omission to plead—Effect—Credit given to principal for portion of damages in agent's suit—Subsequent suit by principal for such damages—Maintainability*—Res judicata.

The plaintiff was a trader and the defendant was his agent, his duties as such being to purchase goods for the plaintiff, to advance, if necessary, moneys for that purpose, to sell the goods so purchased or to despatch them to other constituents named by the plaintiff.

The defendant sued the plaintiff claiming the balance of the amount alleged to be due to him on account of advances made by him for purchase of goods. In his plaint the defendant gave credit for, *inter alia*, an item which represented the sale proceeds of 82 bags of chillies belonging to the plaintiff. The plaintiff contested the suit on the ground that a large sum was due to him in respect of damages for the unauthorised sale of the 82 bags above-mentioned, and that if that amount was taken into consideration the defendant would be found indebted to him and not he to the defendant. The Court called upon the plaintiff to pay Court-fee on the amount claimed by him, but he failed to do so, and a decree was passed in favour of the defendant for the amount due to him less the amount representing the sale proceeds of the 82 bags in question.

Pending the defendant's suit, the plaintiff instituted a suit against him claiming damages on the ground that the sale of the 82 bags in question was unauthorised and contrary to instructions, and the question arose whether the plaintiff's suit was barred under S. 11, Civil Procedure Code.

Held, that it was not barred.

The plaintiff's claim to damages was in the nature of an equitable set-off and it was not obligatory upon him to plead it in the defendant's suit.

The fact that in the defendant's suit the plaintiff obtained a portion of the damages claimed by him by obtaining credit for the sale proceeds of the 82 bags in question, though a ground for reducing the amount of damages awarded to him in his own suit, will not make the question of his right to claim damages *res judicata*.

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*S A No. 223 of 1922. 11th December, 1924.

Second Appeal against the decree of the Court of the District Judge, Anantapur, in Appeal Suit No. 81 of 1924, presented against the decree of the Court of the Subordinate Judge of Anantapur in Original Suit No. 15 of 1920.

B. Somayya for appellant.

A. Krishnaswami Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The question to be decided is, whether S. 11, Civil Procedure Code, bars the trial of the present suit. The facts may be shortly stated. The plaintiff is a trader in the Madras Presidency and the defendant is his agent residing in the Presidency of Bombay. I shall, in my judgment, refer to the plaintiff as principal and to the defendant as agent. The duties of the agent were to purchase goods for the principal, to advance, if necessary, moneys for that purpose, to sell the goods so purchased or to despatch them to other constituents named by the principal. The agent filed O. S. No. 356 of 1919 on the file of the Havari Sub-Court claiming the balance of the amount alleged to be due to him on account of the advance made by him for purchase of goods. In the plaint he gave credit for various sums including an item which represents the sale proceeds of 82 bags of chillies belonging to the principal. It is this item which has been the subject of controversy in this appeal. The suit was thus for the recovery of the advances made, *less* certain credits which *inter alia* included the sale proceeds referred to above. After the agent filed the suit in the Havari Court, the principal instituted a suit in the District Court, Anantapur, claiming damages from the agent on the ground that the sale of the 82 bags in question was unauthorised and contrary to instructions. The agent applied to the District Court under S. 10, Civil Procedure Code for a stay of the later suit and it was accordingly stayed. The agent's suit in the Havari Court was then taken up and tried. The principal raised the contention that a large sum was due to him in respect of damages for the unauthorised sale of 82 bags and if that amount was taken into consideration, the agent would be found indebted to him far from his being liable to pay the agent any sum. At the trial, the Sub-Judge of the Havari Sub-Court directed the principal to pay a Court-fee on Rs. 3,053-10-0, the amount which the principal claimed as due to him. He, however, failed to pay the Court-fee on the

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ground that he had already paid the requisite Court-fee on the plaint which he filed in the District Court, Anantapur. He requested the Judge not to raise an issue in regard to damages stating that he intended to have the claim to damages decided in the suit at Anantapur. The Sub-Judge of Havari accordingly gave no decision of the question relating to the unauthorised sale of the 82 bags and passed a decree in favour of the agent for a certain sum. The principal has now asked the Anantapur Court to proceed with the trial of his own suit. The Sub-Judge of Anantapur dismissed the suit on the ground that the trial of it is barred under S. 11, Civil Procedure Code. The District Judge of Anantapur in appeal has confirmed the decision of the Sub-Judge. The principal has filed the present appeal.

The point to be decided is whether the question of the principal's right to claim damages from the agent has become *res judicata*. In the previous suit the agent claimed the balance due in respect of the advances made by him in the course of the agency. There is no dispute that that amount was substantially due. The principal's main defence was that he was entitled to set off a certain sum of money as damages on account of the sale of the 82 bags in question contrary to his instructions. In effect, the principal admitted the amount due and claimed that on account of damages a different sum would be payable to him. This amounts to a pleading of a set off. But as the sum claimed is not an ascertained sum of money, it is no doubt true that O. 8, R. 6, Civil Procedure Code, is inapplicable. But if cross demands arise out of one and the same transaction or are so connected in their nature and circumstances that they can be looked upon as part of one transaction, Courts of Equity in England have held that the defendant may be allowed to plead a set-off although the amount may be unascertained. The doctrine of equitable set-off has been recognised by Indian Courts and it was open to the principal to plead in the former suit that an amount was due to him for damages. Under S. 11, Explanation 4, any matter which might and ought to have been made a ground of defence in the former suit should be deemed to have been a matter directly and substantially in issue in that suit. There is no doubt that the claim to damages *might* have been a ground of defence in the former suit. The question then is, *ought* the claim to have been made a ground of defence or, in other words, was it incumbent

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upon the principal to claim in the previous suit the equitable set-off ? I put the question in this way because although the principal raised the contention relating to damages in the first instance, his failure to have the issue tried leads to the same legal consequence as an entire omission to raise the plea.

It is conceded at the bar that a defendant is not under an obligation to plead a *legal set-off* and that his omission does not preclude him from bringing a separate suit in respect of it. But it is urged so far as an equitable set-off is concerned, if the defendant fails to plead it, he does so at the risk of the question becoming *res judicata*. I cannot agree to this contention. If there is no obligation on the part of a defendant to plead a legal set-off, which is a matter of right, I fail to see why he should be in a worse position in regard to an equitable set-off which originally was merely permissive in character. The learned vakil for the agent has relied upon *Mahabir Pershad Singh* v. *Macnaghten* (1), but a close examination of the facts of the case will show that this case does not support his argument. It will be seen that the mortgagor in that suit was given a decree for the rents which according to the present contention ought to have been claimed by way of set-off in the previous suit by the mortgagee. The claim disallowed by the Judicial Committee was the claim to have the two decrees, the decree in the mortgage suit and the decree in the rent suit, set-off against each other and to treat as a consequence the mortgage decree as of no avail. This is not an authority bearing on the question.

The next case relied upon is *Ameenammal* v. *Meenakshi* (2). The facts are entirely different and such observations as there are in the judgment of Sadasiva Aiyar, J. to the effect that it is imperative upon a defendant to plead an equitable set-off are *obiter* and are opposed to the practice and the decisions of the English Courts. See *Jenner* v. *Morris* (3) and 25 Halsbury's, p. 485. *Pichi Aiyar* v. *Subbarayar* alias *Subramania Aiyar* (4) also supports my view.

It is not obligatory therefore upon a defendant to plead an equitable set-off. But there is a feature in the present case which presents some little difficulty. In the agent's suit he gave credit for a certain item which according to him repre-

1. (1889) I L R 16 C 682 (P C). 2. (1920) 12 L W 173.
3. (1891) 3 De G F & J 45 : 45 E R 795 at 798. 4. (1915) 28 M L J 513.

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sented the sale proceeds of the 82 bags in question. A decree was passed on the footing that the principal was entitled to that credit. The effect of this is, that the principal has already obtained by virtue of this decree a portion of the damages which he claims he is entitled to. If, in the present action, the Court comes to the conclusion that the principal is entitled to damages, it will become necessary to reduce the amount which otherwise may be awarded to him by the sum for which he has obtained credit in the previous suit. In other words, if it is held that the question of damages has not become *res judicata* the principal will, in effect, be allowed to split up his claim to damages, and as he has obtained a portion in the first action the balance will be awarded in the second. It is the propriety of this proceeding that has to be decided in this appeal. There is no Indian case on the point, but the law is clearly laid down in English decisions that this procedure is authorised.

In *Mondel* v. *Steel* (5) it was held :—

"In all actions for goods sold and delivered with a warranty, or for work and labour, as well as in actions for goods agreed to be supplied according to a contract, it is competent for the defendant to show how much less the subject-matter of the action was worth by reason of the breach of the contract, and to the extent that he obtains, or is capable of obtaining, an abatement of the price on that account, he must be considered as having received satisfaction for the breach of contract ; and he is precluded from recovering in another action to that extent, but no more." To take a concrete instance, suppose *A* entrusts his watch to *B* for repairs to be effected. *B* effects the repairs but breaks the lid and delivers the watch to *A*. *B* sues *A* for Rs. 50 charges for repairing the watch. *A* may plead that he is not liable to pay *B* Rs. 50, because he estimates the damage to his watch by the lid having been broken at Rs. 125. If *A's* case is made out the suit of *B* is dismissed. This suit will not bar *A* from claiming in a separate action the balance of the damages payable to him, namely, Rs. 75. The principle on which this decision is based is that in truth there was no dividing of the cause of action, but the employer is merely allowed to defend himself by showing how much less the subject-matter of the action was worth by reason of the breach of the contract. To the extent

5. 8 M & W 858 : 151 E R 1288.

that he obtains an abatement of price or wages, he must be considered as having received satisfaction for the breach of the contract and he is precluded from recovering in another action only to that extent. The previous suit does not operate as a bar to any further extent. This principle applies in actions for goods sold and delivered with a warranty as also for work and labour. The judgment of the Court which was delivered by Parke, B. traces the course of the decisions on this point and deals exhaustively with this subject.

Daves v. *Hedges* (6) takes the matter a little further. The defendant has the option to obtain an abatement in the first action, but he is not bound to do so. Hannen, J., who delivered his own as well as Blackburn, J.'s judgment, says at page 692 :—

"We have, though not without some doubt, come to the conclusion that the better rule is, that the defendant has the option, if he pleases, to divide the cause of action, and use it in diminution of damages, in which case, as Parke, B. says, he is concluded to the extent to which he obtained, or was capable of obtaining, a reduction, or he may, as in the present case, claim no reduction at all, and afterwards sue for his entire cause of action."

Going back to the illustration which I have given, *A*, the owner of the watch, is not bound to plead in *B's* action that he is entitled to an abatement. He may allow a decree to be passed for the sum claim, namely Rs. 50, and bring a second suit for the damages sustained by him, namely, Rs. 125. The first action is not a bar to the second suit. In the case of *Daves* v. *Hedges* (6) the process is described as dividing the cause of action, but nevertheless the second suit is not held to be barred. The point again is very fully considered in the judgment.

Following these two decisions I hold that the question of the principal's right to claim damages from the agent has not become *res judicata*. The Second Appeal is, therefore, allowed, the decision of the District Judge is reversed and the suit is remanded for trial on the merits. I make no order as to costs. The appellant will have a refund of the Court-fee paid on the Memorandum of Appeal in this and in the Lower Appellate Court.

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6. (1871) L R 6 Q B 687.

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As the Subordinate Judge's Court at Anantapur is not in existence at present, the suit will be tried by the District Judge of Anantapur.

A. S. V. *Appeal allowed : Suit remanded.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Fort William in Bengal.)

PRESENT :—VISCOUNT HALDANE, LORD DUNEDIN AND LORD DARLING.

Udoychand Pannalal ... *Petitioner**

v.

P. E. Guzdar and Company ... *Respondent.*

P. C.

Udoychand Pannalal v. P. E. Guzdar & Company.

*Civil Procedure Code, 1908, S. 110—"Involve directly or indirectly some claim or question respecting property of Rs. 10,000 or more"—Leave to appeal to Privy Council—Sale of goods—Breach of contract—Arbitration—*Ex parte *awards by arbitrators of purchaser of Rs. 81,677-6-9 by vendors' arbitrator of Rs. 3,953-0-3 in their respective favours—Suit to set aside vendors' award of Rs. 3,953-0-3—Application for special leave to appeal to Privy Council under S. 110 of the Code.*

Under a contract for sale of goods between the petitioner and the respondents which contained a provision for referring disputes to arbitration, a dispute arose and cross-claims were made. Certain arbitrators were appointed in a manner directed by the Court ; and the arbitrators passed an *ex parte* award in favour of the respondents which was set aside by the Court. The respondents preferred an appeal against this order. The petitioner filed a suit for Rs. 81,677-6-9, the damages claimed in the arbitration proceedings and the suit was ordered by the Court to be stayed pending the disposal of the above appeal or till otherwise the matter was settled by arbitration. Against this order the petitioner preferred an appeal. Both appeals were dismissed when again the parties betook to arbitration proceedings and differing awards were passed by the arbitrators, an award in favour of the petitioner for Rs 81,000 odd and another in favour of the respondents for Rs. 3,900 odd. The former award was set aside by an application to the Court. The petitioner then sued to set aside the award for Rs. 3,900 odd in favour of the respondents which was decreed by the High Court on the original side but dismissed on appeal. On an application for special leave to appeal to Privy Council under S. 110 of the Civil Procedure Code, the High Court having dismissed the application made to it :

Held, that in the circumstances of the case, it was not one in which "the decree or final order involves indirectly some claim or question to or respecting property of the value or amount of Rs. 10,000 or upwards within S. 110 of the Civil Procedure Code, as even if he succeeded in the appeal, the petitioner would have to get rid of the order staying the suit which had not been appealed against. A prayer in the petition for special leave to appeal by which he

*27th March, 1925.

prayed for an order for leave to appeal against the order for stay would not avail the petitioner as he would still have to succeed in that appeal and also in the suit on the merits. These contingencies are too remote to bring the case within the expression "property indirectly involved in the issue of this suit."

Petition for Special Leave to appeal from the order of the High Court (28th July, 1922) staying petitioner's Suit No. 635 of 1922, and another order of the same Court dismissing the petitioner's Suit No. 3423 of 1922 made the 30th January, 1924.

By two contracts made the 14th and 24th July, 1919 respectively, the respondents agreed to sell to the petitioner for shipment to the United Kingdom 500 bales of jute, one of the terms being that all matters in dispute arising out of the contracts should be settled by arbitration. The jute was duly shipped to the petitioner's buyers in England, who claimed arbitration on the ground that it was not of the proper quality. An arbitration was held in England, and the award of the 9th January, 1920, found the jute of inferior quality, and gave the buyers the option of invoicing it back at the prices therein mentioned, which option was in due course exercised, and on the 4th February, 1920, the petitioner sent the respondents a bill for Rs. 96,660-5-0, the invoiced back allowance, towards which the respondents paid Rs. 15,000 pending the realisation of the jute in England. After such realisation the petitioner sent to the respondents an account showing a balance of Rs. 68,382-8-3 as due, which the respondents contested, alleging that only Rs. 28,827-5-6 was due. A sole arbitrator was then appointed, who, on the 15th July, 1920, awarded Rs. 13,987-7-0 to the petitioner, which award was, however, set aside by the High Court on the 25th October, 1921, with certain directions as to the appointment of new arbitrators. New arbitrators were then appointed in the manner directed by the Court, and their award, dated the 21st November, 1921, was set aside also by the Court on the 7th February, 1922, but the respondents appealed from this last order.

On the 20th February, 1922, the petitioner filed a suit against the respondents (Suit No. 635 of 1922) for the recovery of Rs. 81,677-6-9 made up as follows :—

	Rs.	A.	P.	
	68,382	8	3	claimed above.
	13,294	14	6	interest at 6 per cent.
Total ...	81,677	6	9	

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On the 21st March, 1922, the respondents applied to the High Court for a stay of all proceedings in the suit pending their aforesaid appeal, and on the 27th April, 1922, this application was granted. The petitioner thereupon appealed against this order of stay. On the 19th July, 1922, the Court of Appeal dismissed the respondents' appeal against the order of the 7th February, 1922, which had set aside the arbitrators' award of the 21st November, 1921, and on the 28th July it also dismissed the petitioner's appeal against the order of the 27th April, 1922, staying proceedings in Suit No. 635 of 1922.

Then after further disputes as to the fitness of various proposed arbitrators, one arbitrator nominated by each party made separate awards ; the petitioner's nominee awarding him on the 11th Nov., 1922, the aforesaid sum of Rs. 81,677-6-9 with interest at 6 per cent. from the 16th February, 1922, and the respondents' nominee on the 6th December, 1922, awarding them Rs. 3,953-0-0 *plus* Rs. 87-8-0 for costs of the arbitration. The petitioner thereupon instituted another suit in the High Court (Suit No. 3423 of 1922) against the respondents for setting aside the *ex parte* award of their arbitrator, and the judgment of the Court of the 23rd March, 1923, decreed that this award be set aside. On the 30th January, 1924, however, the respondents' appeal therefrom was allowed and the suit was dismissed. The petitioner applied to the Court for leave to appeal from this judgment, but it was refused because "unless the award in question was set aside, the plaintiff's Suit No. 635 of 1922 for the recovery of Rs. 81,677-6-9 could not be effective, and the claim for damages in that suit is not a claim or question respecting *property* within the meaning of S. 110 of the Civil Procedure Code, 1908." The petitioner then applied to the Privy Council for special leave to appeal from both the order of the 28th July, 1922, and the 30th January, 1924.

L. de Gruyther, K. C. and *J. M. Parikh* for petitioner.

Sir George Lowndes, K. C. and *E. B. Raikes* for respondents.

[During the argument, reference was made to *Macfarlane* v. *Declaire* (1) and Transfer of Property Act, 1882, Ch. II.]

1. 15 Moore's P C 187.

P. C.

Udoychand Pannalal v. P. E. Guzdar & Company.

Lord Dunedin.

27th March, 1925. The Judgment of the Board was delivered by

LORD DUNEDIN :—The question raised by this petition is as to the meaning of S. 110 of the Civil Procedure Code. The circumstances which have given rise to it are peculiar and complicated. They arise out of a contract for sale of goods made by the respondents with the petitioner. In the contract of sale there was a provision that all disputes arising out of the sale should be settled by arbitration. A dispute did arise and cross-claims were made. The parties commenced arbitration proceedings, but disagreed as to appointment of arbitrators. An arbitrator appointed by the respondents made an *ex parte* award in their favour, but this was set aside by the Court. New arbitrators chosen in a manner ordered by the Court were then appointed. Another *ex parte* award was made and this also was set aside. Against this order setting it aside the respondents appealed. The petitioner then filed a suit claiming the damages he had sought in the arbitration. This was met by an application to stay the suit pending the disposal of the above-mentioned appeal, or otherwise until the matter was settled by arbitration. The High Court granted the stay. The petitioner appealed against that order. The Court of Appeal then took up this appeal and the appeal before mentioned and it dismissed both appeals, the date of the dismissal of the last-mentioned being the 28th July, 1922. The parties then again betook themselves to arbitration. Again the arbitrators were unable to agree and *ex parte* awards were made, one in favour of the petitioner for Rs. 81,000 odd, the other in favour of the respondents for Rs. 3,900 odd.

On the 5th December, the High Court, on the application of the respondents, set aside the award in favour of the petitioner. The petitioner then raised a suit to set aside the award in favour of the respondents, and it is in this suit that the petition comes before the Board. The High Court in its original jurisdiction set it aside, but on appeal the Appeal Court reversed and dismissed the suit. The petitioner applied for leave to appeal, but this was refused upon the ground that the sum involved was neither directly nor indirectly of the value of Rs. 10,000.

The only question, therefore, is whether the case falls within the words of S. 110 ; that section is as follows :—

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110. In each of the cases mentioned in clauses (*a*) and (*b*) of S. 109, the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount of value,

and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must evolve some substantial question of law.

Now, it is clear that the present case does not fall under the first paragraph because the actual subject of the suit is only Rs. 3,000 odd. Nor does it fall under sub-section (*c*) of S. 109, which is as follows :—

(*c*) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council,

because it has not been certified. It is, therefore, if at all, under the second paragraph of S. 110. The learned Judges of the High Court have held that it does not so fall upon the ground that here what is affected directly or indirectly is not property. The appellant argued that it must be property because the right which the petition has to make good was the claim of right which, in the nomenclature of English Law, is called a *chose in action*, and because the transference of such rights is dealt with in the Transfer of Property Act.

Their Lordships are not inclined to attempt any precise definition of the word "property." The Civil Procedure Code has not done so, and any definition might not be found in the future precisely to fit the circumstances which the kaleidoscope of actual experience may produce. But they think that the present is not a case where the issue of this suit can be said directly or indirectly to involve other property. Let the situation be considered. If this appeal were allowed and were successful, what would be the position ? The petitioner would indeed get rid of his present liability to pay Rs. 3,000, but that is the subject-matter of the suit and is not of the value of Rs. 10,000. What, then ? The first thing that he would have to do would be to get rid of the judgment of the 28th July, 1922, staying his suit. Against that judgment he did not appeal, and he feels that so much that he has appended to the present petition a further prayer to be allowed to appeal against that order. He would have to be successful in that appeal and then also he would have to succeed on

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the merits of his suit, and not till then would he be in possession of anything tangible in the way of money.

Their Lordships think that this is not really consequential on the present decree and too remote to be entitled to the description of being property indirectly involved in the issue of this suit. It must always be kept in view that no real mischief can arise from not allowing a very wide construction of the section, because such cases, if worthy of being tried by a higher tribunal, can always be dealt with under sub-section (*c*) of S. 109.

Their Lordships will humbly advise His Majesty to refuse the prayer of the petitioner with costs.

Solicitors for petitioner : *Downer, Johnson and Co.*

Solicitors for respondents : *Watkins and Hunter.*

A. de M. *Prayer refused.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD ATKINSON, LORD CARSON, SIR JOHN EDGE AND MR. AMEER ALI.

Sevak Jeranchod Bhogilal and others ... *Appellants**

v.

The Dakore Temple Committee and others... *Respondents.*

P. C.

Sevak Jeranchod Bhogilal v. The Dakore Temple Committee.

Civil Procedure Code, Ss. 47, 109 and 110—Religious endowment—Scheme for management framed by the Privy Council—Rules framed by the Temple Committee under the Scheme subject to sanction by the District Court—Power under the Scheme of the High Court to alter, modify or add thereto under the Scheme—Appeal from the District Judge's sanction of the rules—Whether lies under S. 47 of the Civil Procedure Code—Appeal to Privy Council from the decision of the High Court, whether competent under Ss. 109 and 110—Letters Patent of the Bombay High Court, cl. 39—"Judgment," meaning of.

Pursuant to a Scheme prescribed by a decree of the Privy Council in 1912, which empowered the Committee of a Temple in Ahmedabad to frame Rules for its management, etc., subject to the sanction of the District Judge of Ahmedabad, and to alteration, modification, or addition thereto by the High Court at Bombay, the Committee duly drew up certain Rules, which, with some modifications, were sanctioned by the District Judge. Various interested parties appealed from this order of sanction to the High Court, where they also simultaneously filed applications for modification of the Rules under the clause reserving power in that behalf in the Scheme. The High Court omitted to exercise its powers under the Scheme for alteration, modification, or addition to the Rules but in the absence of opposition to the appeals being treated as coming under

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*P C Appeal No. 95 of 1923. 30th March, 1925.

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Sevak Jeranchod Bhogilal v. The Dakore Temple Committee.

S. 47 of the Civil Procedure Code, 1908, heard and adjudicated on the appeals. It also granted a certificate to the appellants under S. 110 of the Civil Procedure Code that the case was a fit one for appeal to His Majesty in Council.

Held, the case did not come under S. 47 of the Code, but under the special jurisdiction conferred on the Courts by the terms of the Scheme of 1912, and that, in consequence, no appeal lay from either the District Judge to the High Court, or from the order or decree of the High Court to the Privy Council.

The term "judgment" in S. 39 of the Letters Patent of the 28th December, 1865, means, in civil cases, a decree, and not a judgment in the ordinary sense.

Appeal from a decree of the High Court (11th April, 1919) varying a judgment and order of the District Judge, Ahmedabad (22nd September and 5th December, 1914).

In 1880 certain Gors and representatives of the family of the Tambekars of Dakore had sued the Sevaks for an account of the management of the Temple of Shri Ranchhod Raiji at Dakore, the appointment of a Receiver, and the settlement of a scheme of management. The decree of the High Court in that suit [*Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (1)] was appealed from by the Sevaks, who also in the meantime since 1883 issued rules prohibiting, except upon payment of fees for passes, entry into the Nij Mandir (Holy of Holies) and consequently, in 1887, 208 Trawadi Mewada Gors of Dakore brought a second suit against 133 Sevaks to set aside these rules and to establish their right of free access to the shrine. The Assistant District Judge, Ahmedabad, made a decree in 1888, which was confirmed on appeal by the High Court in 1890 [*Kalidas Jivram* v. *Gor Parjaram Hirji* (2)]. Subsequently, in 1899, the Privy Council dismissed the appeal in the first suit [*Chotalal Lakhmiram* v. *Manohar Ganesh Tambekar* (3)]. Eventually, in September, 1906, the High Court sanctioned a scheme of management of the Temple, which, with certain modifications, was confirmed by the Privy Council in 1912 [see *Sevak Kirpashankar* v. *Gopalrao* (4)]; and cl. 12 (7) whereof provided that

"The Committee shall have power........to have all the rules framed by them sanctioned by the District Court of Ahmedabad to the intent that the rules, when sanctioned, shall have the same force as if they were part of the Scheme;"

and cl. 20 provided that—

"The provisions of this Scheme may be altered, modified, or added to, by an application to His Majesty's Court of Judicature at Bombay."

1. (1887) I L R 12 Bom 247.
2. (1890) I L R 15 Bom 309 at 314.
3. (1899) I L R 24 Bom. 50.
4. (1912) 15 Bom. L R 13.

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The Temple Committee thereupon submitted on the 3rd January, 1914, to the District Judge, Ahmedabad, certain rules framed by them under cl. 12 of the Scheme. The Sevaks (appellants) filed their objections thereto, and, after the hearing, the District Judge on the 5th December, 1914, sanctioned the rules with certain modifications. The Sevaks, the Gors, and various other interested parties filed appeals against this order (Appeals Nos. 75, 76, 78, 79, 80, 121, 122, 149, 206 and 223 of 1915—purporting to be under S. 47 of the Civil Procedure Code, 1908), and also concurrently Applications (Nos. 289—290 and 397—399 of 1915) for modification, under cl. 20 of the Scheme, of the rules sanctioned by the District Judge. On the 11th April, 1919, the High Court (Scott, C. J. and Hayward, J.) gave judgment on the appeals varying the decree of the District Judge by amending the rules in certain particularized respects, but made no order on the applications, which they considered filed *ex majore cautela.* They directed a vakil of the High Court (Mr. Ratanlal) to formally make the amendments to the rules in the sense indicated, after consultation with the pleaders of the parties ; and this was done, and the new draft rules so drawn up were sanctioned on the 22nd September, 1919, and a formal decree, dated the 11th April, 1919, was then drawn up with reference to all the aforesaid appeals. The Sevaks thereupon, with special leave granted on the 20th March, 1920, appealed therefrom to His Majesty in Council.

Sir George Lowndes, K. C. and *E. B. Raikes* for the 2nd and 3rd respondents took a preliminary objection as to the competency of the appeal. The order of the 11th April and 22nd September, 1919 is not appealable as by the Scheme of 1912 the High Court was the Court of ultimate jurisdiction in the framing of the rules, and orders connected therewith are not orders falling under S. 47 of the Civil Procedure Code, 1908. Hence, the High Court was wrong in according the appellants leave to appeal from the said orders, and in certifying on the 20th March, 1920, that this was a fit case for appeal to His Majesty. S. 39 of the Letters Patent of the 28th December, 1865, cannot cover the case.

A. M. Dunne, K. C. and *W. Wallach* for 1st respondent adopted the same arguments.

L. de Gruyther, K. C. and *J. M. Parikh* for appellants :— In all civil matters the High Court has appellate jurisdiction

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over inferior Courts, and under S. 110 of the Civil Procedure Code, 1908, appeals from the orders of the High Court lie to His Majesty's Privy Council. It is now too late for the respondents to question the legality of the orders of the inferior Courts in India, as all parties submitted to their jurisdiction without query.

30th March, 1925. The Judgment of the Board was delivered by

Sir John Edge.

SIR JOHN EDGE :—This case has come before their Lordships in the form of an appeal to His Majesty in Council from an order of the High Court of Bombay. On the 31st March, 1920, the High Court certified that the appeal involved a substantial question of law and was otherwise a fit one for appeal to His Majesty in Council, and on the 26th July, 1920, the High Court admitted the appeal and ordered notice to be given to the respondents. The question which their Lordships have to consider is whether the appeal lay. For that purpose it is necessary to refer as briefly as possible to the history of the case to see if any appeal in this case to His Majesty in Council arose or was admissible.

The case relates to the management of a public Hindu temple at the village of Dakore which is within the jurisdiction of the Court of the District Judge of Ahmedabad. In the temple is installed the idol of Shri Ranchhod Raiji, which is much revered by Hindus. Disputes arose as to the management of the temple and at least two suits were brought in respect of the management, one of which came on appeal to His Majesty in Council as to a scheme for the management which had been sanctioned by the High Court of Bombay. On the 14th May, 1912, the Board, having made some alterations in the scheme and having advised that the scheme, as altered should be affirmed, His Majesty with the advice of His Privy Council, confirmed the scheme, as altered by the Board, and made an Order in Council accordingly.

The Dakore Temple scheme so confirmed by His Majesty's Order in Council of the 14th May, 1912, provided, amongst other things, for the appointment of The Dakore Temple Committee to consist of five members who should be Hindus professing faith in Shri Ranchhod Raiji, and empowered the Committee to take the Temple property into their custody and to make rules for the guidance of their business and for the management of the Temple and for other purposes. The

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purposes for which such rules might be made were specified in cl. 12 of the scheme, and it was provided that the rules, when sanctioned by the District Court of Ahmedabad, should have the same force as if they were part of the scheme.

Cl. 20 of the scheme, as confirmed by His Majesty's Order in Council, is as follows :—

"20. The provisions of this scheme may be altered, modified, or added to, by an application to His Majesty's High Court of Judicature at Bombay."

The Temple Committee, having been duly appointed, framed a body of rules, as the Committee was empowered to do, and those rules came before Mr. B. C. Kennedy, as the District Judge of Ahmedabad, for the sanction of his Court, and he, on the 5th December, 1914, made certain alterations in the rules, and, as altered by him, sanctioned the rules. On the 23rd March, 1915, certain members of the Trawadi Mewada Brahmin caste, who had exercised certain rights in the temple or were otherwise interested in the management of the temple, presented to the High Court of Judicature at Bombay an "Application under cl. 20 of the scheme for modification of the rules sanctioned by the District Judge." To that application the managing member of the Temple Committee and another were made respondents. The sanction given by the District Judge to the rules was apparently considered in the High Court, although erroneously, to be an Order made under S. 47 of the Code of Civil Procedure, 1908, and appeals from it were presented to the High Court at Bombay. The appeals, and the application, came before a learned Judge of the High Court for disposal, and he, obviously doubting that the appeals lay, said in his judgment of the 22nd September, 1919, as follows :—

"These appeals and applications relate to the rules which have been framed under cl. 12 of this scheme and sanctioned in 1914 by Mr. Kennedy, the District Judge of Ahmedabad. The appeals have been filed as appeals from orders in execution passed under cl. 12 (7) of the scheme by the District Judge of Ahmedabad. We think we ought to deal with them as such as no objection has been taken. No orders need therefore be passed on the applications filed *ex majore cautela* as applications under cl. 20 of the scheme reserving general power of interference to the High Court."

Thereupon the learned Judge wrote and delivered a judgment in which he expressed his views as to the rules which had been sanctioned by the District Judge. The appeals to the High Court did not lie and should have been rejected.

The learned Judge should have remembered that parties cannot by acquiescence or consent confer upon a Court a juris-

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diction which it has not got. The High Court at Bombay had power conferred upon it by cl. 20 of the scheme confirmed by His Majesty's Order in Council upon an application made to it with that object to alter, modify or add to the rules sanctioned by the District Judge, but it had no other power, and that power it did not exercise ; it may, however, still be exercised upon application properly made to it.

There was no right of appeal to His Majesty in Council from the judgments of the High Court of the 11th April, 1919, and 22nd September, 1919, or from any decrees which were drawn up, except on the sole ground that the judgments or decrees were incompetent. The term "judgment" in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense. This appeal to His Majesty in Council should not have been admitted.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the judgments or decrees be set aside, as these judgments appealed from were incompetent. There will be no costs of this appeal.

Solicitors for appellants : *T. L. Wilson and Co.*

Solicitor for 1st respondent : *E. Dalgado.*

Solicitors for 2nd and 3rd respondents : *Downer and Johnson.*

A. de M. *Appeal allowed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Fort William in Bengal.)

PRESENT :—LORD SHAW, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI.

Pramatha Nath Mullick ... *Appellant**

v.

Pradyumna Kumar Mullick and another ... *Respondents.*

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Hindu Law—Worship of household idols (Thakurs)—Control by founder's (shebait's) heirs—Dedication of property to idols—Removal of idols from dedicated shrine—Representation of idols, and of female members of founder's family in litigation—Right of founder and his successor to appoint shebait.

A Hindu family idol is a juristic entity, capable of suing and being sued ; and its interests are attended to by the person who has the deity in his charge and who is, in law, its manager, with all powers of management of the estate

*P. C Appeal No. 59 of 1924. 28th April, 1925.

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of an infant heir. The duties of piety, from the time of consecration, are duties to something existing, which, though symbolizing the Divinity, has legally the status of a separate juristic *persona*. Its position and rights must, therefore, as regards its preservation, maintenance and worship, be in the charge of a human being, who is the *shebait* (ministrant), custodian of the idol, and manager of its estate.

Such idols are not moveable chattels or subjects of property, nor is their destruction, degradation, or injury within the power of the custodian for the time being.

Rambrahma Chatterji v. *Kedar Nath Banerji*, 36 Cal L J 478 ; *Khetter Chunder Ghose and others* v. *Haridas Bundopadhya*, I L R 17 C 557 ; *Gossamee Sree Greedharreejee* v. *Rumanlolljee Gossamee*, 16 I A 144 ; *Jagannath Prasad Gupta* v. *Runjit Singh*, I L R 25 C 354 ; *Sheoratan Kunwari* v. *Ram Pargash and others*, I L R 18 A 227 ; and *Musammat Jai Bansi Kunwar* v. *Chattar Dhari Singh*, 5 Beng L R 181 referred to.

The will of the idol in regard to its location must be respected ; and it is open to an idol, acting through its shebait, to conduct its worship in its own way at its own place, provided the acts of the shebait, expressive of its will, are not inconsistent with the reverent and proper conduct of its worship by those members of the founder's family who render service and pay homage to it.

Each of the owners of a joint right of performing the worship of an idol is entitled to perform his worship in due rotation or by turns.

The founder, at any time before his death, or his successor likewise, may confer the office of shebait on another.

In litigation relating to the control and worship of a Hindu idol, not only the shebaits, but the idols themselves, by a disinterested next friend and the female members of the founder's family, must be adequately represented before the Court.

Mitta Kunth Audhicarry v. *Neerunjun Audhicarry and others*, 14 Beng L R 166 referred to.

Appeal from a decree (10th April, 1923) of the High Court, Appellate Jurisdiction (Sanderson, C. J. and Richardson, J.) reversing a decree of the same Court, Original Jurisdiction (Greaves, J.) made the 1st June, 1922.

The facts and arguments appear sufficiently from the judgment of their Lordships.

A. M. Dunne, K. C. and *S. Hyam* for appellant.

L. de Gruyther, K. C. and *J. M. Parikh* for respondents.

[In addition to the authorities referred to in their Lordships' judgment, the following were also cited in the course of the argument :—

Subbaraya Gurukkal v. *Chellappa Mudali* (1), *Ramsunder Thakur* v. *T. C. Tarkoruttum* (2), *Rajeswar Mullick*

1. (1881) I L R 4 M 315. 2. (1872) 19 W R 28.

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v. *Gopeswar Mullick* (3), *Girijanund Datta Jha* v. *Sailajanund Datta Jha* (4) and *Jagat Mohini Dasi* v. *Sokhimoni Dasi* (5)].

28th April, 1925. The Judgment of the Board was delivered by

LORD SHAW :—The questions raised by this appeal are of a wide and general importance. They have reference to the control and worship of a Hindu family idol. It may be explained that although one idol is referred to, called of course the Thakur, there were two others, the Thakurani, a female idol referred to in some of the papers as the consort of the Thakur, and there was also a third, a sacred or deified stone called the Salgram Sila. These three idols became the objects of the pious worship of the family of the founder, Mutty Lal Mullick, who originally installed them. But the points in the case can be more simply treated by referring to the one, namely the principal idol, the Thakur.

The appeal is from a decree, dated the 10th April, 1923, made by the High Court in Calcutta in its Civil Appellate Jurisdiction reversing a decree, dated the 1st June, 1922, made by the same Court in its Original Civil Jurisdiction.

The case was argued at great length, and a large mass of authorities was cited.

Before entering upon the legal questions which were debated, their Lordships think it not inadvisable to state the family history, in so far as it concerns the installation of this idol. It was established and consecrated many years ago by a wealthy Hindu inhabitant of Calcutta, Babu Mutty Lal Mullick, in his family dwelling-house, in a Thakur Ghar, or room therein, set apart for worship.

Mutty Lal Mullick died in 1846 leaving a widow, Ranganmoni, and an adopted son, Jadulal, then two years of age. He left a will, dated 17th August, 1846 (shortly before his death). He had for some time prior to his death set up and established and consecrated the idol, and no doubt is thrown upon the fact that the idol so installed became unquestionably the object of worship by himself and the family. The will provided that his widow should be the malik or proprietor and attorney, for the protection and care of the whole of his estate until his adopted son Jadulal attained the age of 20, and the

3. (1907) 12 C W N 323. 4. (1896) I L R 23 C 645.
5. (1871) 14 Moore's Ind App 289.

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enumeration included the Sri Iswar Thakurs, Thakuranis, etc., established by him and ancestorial.

Upon the adopted son attaining 20 the property was to be made over to the son as his heir. There was a power to the widow in case the adopted son died without issue to adopt another. A gift was made to the widow of one lac of rupees, together with various jewels and silver with right of residence in the family residence. With regard to the maintenance and worship of the idol certain funds, amounting to Rs. 600 a month, were to be drawn by the widow and therewith she was to defray the expenses of the idol's Sheba (or worship) and for religious festivals and ceremonies, "in the method that I have paid and defrayed the same hitherto." Upon the adopted son attaining 20 the widow was to "make over the whole of the property to him fully and he will in a like manner protect the whole of the property and effectuate the Kreah Karmas, or religious acts and ceremonies."

It seems accordingly clear that in Mutty Lal Mullick's lifetime the idol was, as already stated, established as a household god ; and the pious founder, narrating his own upkeep and maintenance of the deity, gave funds in order that those should be continued ; and he prescribed the duty of continuance to the widow during the adopted son's minority and upon the son thereafter during his life.

One of the questions emerging at this point, is as to the nature of such an idol, and the services due thereto. A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the recognition thereof by Courts of Law, a "juristic entity." It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir. It is unnecessary to quote the authorities ; for this doctrine, thus simply stated, is firmly established.

A useful narrative of the concrete realities of the position is to be found in the judgment of Mukerji, J. in *Rambrahma Chatterji* v. *Kedar Nath Banerji* (1) :—

"We need not describe here in detail the normal type of continued worship of a consecrated image—the sweeping of the temple, the process of

1. (1922) 36 C L J 478 at 483.

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smearing, the removal of the previous day's offerings of flowers, the presentation of fresh flowers, the respectful oblation of rice with flowers and water, and other like practices. It is sufficient to state that the deity is, in short, conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servant. The daily routine of life is gone through with minute accuracy; the vivified image is regaled with the necessaries and luxuries of life in due succession, even to the changing of clothes, the offering of cooked and uncooked food, and the retirement to rest."

The person founding a deity and becoming responsible for these duties is *de facto* and in common parlance called Shebait. This responsibility is, of course, maintained by a pious Hindu, either by the personal performance of the religious rites or—as in the case of Sudras, to which caste the parties belonged—by the employment of a Brahmin priest to do so on his behalf. Or the founder, any time before his death or his successor likewise, may confer the office of Shebait on another.

Under the will of Mutty Lal Mullick he did not adopt the latter course, but he acted as Shebait with the Brahmin assistance referred to. After his death his widow officiated similarly as the ministrant of the worship, and she used, as directed, the endowed funds specially destined for the upkeep and worship of the deity. After the adopted son Jadulal reached the age of 20 he then became *de facto* the person, charged with the same duties, to be performed as fully as his adoptive father and mother had performed them.

It must be remembered in regard to this branch of the law that the duties of piety from the time of the consecration of the idol are duties to something existing which, though symbolising the Divinity, has in the eye of the law a status as a separate *persona*. The position and rights of the deity must, in order to work this out both in regard to its preservation, its maintenance and the services to be performed, be in the charge of a human being. Accordingly he is the Shebait custodian of the idol and manager of its estate. And so, paying proper respect to the religious proprieties of the case, the father, mother and adopted son were successively and *de facto* ministrants and custodians of this idol.

The period during which this state of matters existed was in the narrative from anterior to 1846 till the year 1864. The widow's charge of the affairs of the idol had come to an end; and Jadulal the son's period of administration, he having reached the age of 20, had begun. Jadulal died in the year 1894. What had happened during his period of administra-

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tion was this : that in 1881 he enlarged the old family dwelling-house containing the Thakurbari in which the household gods had hitherto resided and were worshipped. He had erected a puja dalan for the worship of all the family Thakurs, including the three referred to, that is to say, instead of one house with its Thakurbari for the family, two houses were erected on adjoining plots of ground and between these the puja dalan was erected, having a private entrance from each of the private dwellings so that the family worship was conducted with due decorum and propriety in what was practically an annexe to either house.

Two other events occurred which are important during this period of Jadulal's regime. In 1888 he executed a deed of trust providing particular premises for the location and worship of the deities in the puja dalan aforesaid. The terms of this deed are the centre of the contentions raised by the parties in the appeal and will be more particularly hereinafter referred to. The other fact affecting this period was that in the year 1891 Ranganmoni, the widow of Mutty Lal Mullick, died. She made a very large endowment in favour of the family idol, amounting to about one lac of rupees. By her will she appointed Jadulal her executor and trustee and she made a disposition of her property in these terms :—

"I give and devise my tenanted land, No. 129, Bowbazar Street in Calcutta, to my said trustee, his heirs and representatives to be held by him and them upon trust, to apply the rents and income thereof, after providing for the payment of taxes and other outgoings, in the performance of the daily and periodical worship of the idol, consecrated by my late husband, called Radha-Shamsunder, such worship to be performed by my said son and his descendants."

Jadulal died in 1894, leaving issue three sons and four daughters. The estates were large, and a suit for partition among the three sons ensued. Questions of importance were raised as to :—

(1) The provisions of Jadulal's will ; and

(2) The endowment by Ranganmoni.

On the former head the disputes and differences were submitted to the arbitration of the late Mr. W. C. Bonnerjee, who delivered an award in 1899. That award was made a rule of Court. In the partition proceedings, Mr. Bonnerjee declared that the three sons, as Jadulal's heirs, were entitled to the residue of the father's estate in three equal shares. He allotted one of the two houses to the first son, another to the

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third son, and, in regard to the second son, the present appellant, he was, so to speak, paid out in money in order that he might erect a desirable residence for himself. Among other trusts declared in Jadulal's will was the following, namely :—

The trust for the worship of the said Jadulal Mullick's hereditary Goddess Sri Sri Singhabahini Debi and other family deities during his turn or pala of worship.

It is to be observed that, although the turn or pala of worship as amongst the three sons was recognised in that part of the award the idols in question in this case were not named.

In a subsequent part of the award various turns of worship were given to the sons in order. As to the Thakurbari, or puja dalan, plans were referred to, and it was declared to be the joint property of the three sons. Prohibition was made against the two sons vested in the adjoining properties raising any structure or building of any kind which might interfere with the joint property. The situation created by this deed accordingly was that, while the deities were not named, the joint property of the three sons in the house dedicated to the idol was declared and the system of worship by turn or pala was established.

With regard to Ranganmoni's estate and endowment, a suit was brought in 1904, and in June, 1905, it was decreed that a scheme should be framed for carrying on the varied trusts of the lady's will and, subject to provision being made therefor, her estate should be divided into three equal shares among the plaintiff and defendants in this suit. A commission was accordingly issued to Babu Bhupendra Nath Basu to frame a scheme of worship and to partition the residue. This was done by return to the commission, which appointed the worship of Thakur Sri Sri Radha Shamsunderji, the idols in question in this suit, in the following terms :—

"I direct that the sheba and worship of the Thakur Sri Sri Radha-Shamsunderji and of the Thakur located at Mahesh and Brindaban and the Ekodistha sradh will be performed by the parties and their heirs by turns of one year each, the first turn commencing from the 1st day of Baisakh in the Bengali year 1317 and such first turn shall devolve on the said Pradyumna Kumar Mullick and his heirs, the second turn commencing from first day of the month of Baisakh 1318 shall devolve on the said Pramatha Nath Mullick and his heirs, and the third turn commencing from the first day of the month of Baisakh 1319 shall devolve on the said Manmatha Nath Mullick and his heirs, and so on by rotation. On the demise of any one of the parties, his heirs will become entitled to his turn of worship, and the party having the turn of

worship will perform such worship without any interference by any of the other parties."

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The family very sensibly acted in accordance with the rules set down in these proceedings. The practical result was that the parties, now judicially separated, continued the worship of the idols. The idol was, of course, not removed by the parties during their period of worship or pala because in the building as constructed the idols were located as mentioned in a building adjoining their respective houses.

In the year 1910—11 the second son's establishment was set up. The idol was removed to his house in connection with certain festivals considered suitable for the occasion and, after these were concluded in February, 1911, was brought back to the puja dalan. In May, 1911, the second son's year of pala, or turn of worship, came round and the family idol was removed to the Thakurbari of his house and family worship continued there for one year. In 1914 the same thing occurred, the first respondent being still an infant. It is not suggested in any part of the case that these temporary transfers of the location of the family idol (such temporary transfers on occasions of festivals are familiar in the community) were not conducted with complete reverence and propriety and without interruption of the ordinary daily services tendered to the idol or any of the rights connected with its worship. In short, the results of the partition suit, the interpretation of the wills of Jadulal and Ranganmoni, and the awards made therein, were so far worked out without defect or friction.

When the appellant's pala, however, again came round, namely in 1917, the transfer of the idol by him as before to his Thakurbari was objected to by the first respondent, who had now attained majority (with whose objection the third son concurs) ; and the broad question in this appeal is whether that objection is well founded in law.

In substance the objection is founded upon the deed executed in 1888 by Jadulal.

The argument in the Appellate Court is thus recorded by Richardson, J. :—

The learned Standing Counsel, Mr. B. L. Mitter, founding on Mutty Lal's will, argued that the testator treated the idols or images which he had set up as his personal property and left them absolutely to Jadulal. When pushed, Mr. Mitter said that Jadulal might, if he had so pleased, have thrown them into the river.

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The Appellate Court rejected that proposition. And this Board can give no countenance to it. As is added in the judgment referred to :—

The inclusion of the idols, however, among items of property, moveable and immoveable, does not show that the testator regarded his interest in them in the same light as his interest in his secular property. The careful directions given later in the will show that the testator intended the worship of the ancestral deities and the deities he had established to be a charge upon his estate.

There may be, in the nature of things, difficulties in adjusting the legal status of the idol to the circumstances and requirements of its protection and location and there may no doubt also be a variety of other contacts of such a *persona* with mundane ideas. But an argument which would reduce a family idol to the position of a mere moveable chattel is one to which the Board can give no support. They think that such an argument is neither in accord with a true conception of the authorities, nor with principle. The Board does not find itself at variance with the views upon this subject taken in the Appellate Court or with the analysis of the authorities there contained.

The Appellate Court, it is true, felt itself constrained by the terms of the deed of 1888 to arrive at a conclusion adverse to the case of the appellant ; but upon the main points in argument, both as to the contention that the household god was mere property, and as to Jadulal's right being absolute therein, this appeal was argued before the Board by the counsel for the respondents here on the footing that if the Appellate Court's decree depended on the reasons given, it could not be defended. The Board is, on the contrary, of the opinion that, upon the two points they discussed, the reasoning and view of the High Court are sound.

Their Lordships would only add, on the subject of property, that the argument is said to be supported by the judgment of Banerjee, J. in *Khetter Chunder Ghose and others* v. *Hari Das Bundopadhya* (2). In that case the facts were that the household idol was made over to relatives, owing to the family, whose idol it was, being unable to carry on the worship on account of the paucity of profits of the endowed lands, and it was held that the transfer was justified in the interests of the idol. It was a proper and a pious act. The Shebait, being charged fundamentally with the duty of seeing

2. (1890) I L R 17 C 557.

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to the worship being carried on, and, having the concurrence of the entire family to the transaction, did have power to carry through the transaction "for the purpose of performing its worship regularly through generation to generation." The members of the family were thereby deprived of no right of worship. The interests of worshippers and idol were conserved. Their Lordships do not think that such cases form any ground for the proposition that Hindu family idols are property in the crude sense maintained, or that their destruction, degradation or injury are within the power of their custodian for the time being. Such ideas appear to be in violation of the sanctity attached to the idol, whose legal entity and rights as such the law of India has long recognised.

The argument as to property being thus displaced, their Lordships have now to consider the position of Jadulal, the grantor of the deed of 1888.

Was he Shebait of this idol in the narrower sense as the appellant contends or did he succeed by virtue of Mutty Lal's will to the rights and privileges possessed by the testator? In the deed of 1888, Jadulal declares as follows :—

"Whereas the said Babu Mutty Lal Mullick, the father of the said Jadulal Mullick, established and consecrated the Thakur called Radha Shamsunderji."

As has been seen, during his life Mutty Lal Mullick had *de facto* performed piously and regularly all the duties which the law would charge upon the custodians of the idol. It stands without question that Jadulal himself was fully performing similar duties and functions. As was said by Lord Hobhouse in *Gossamee Sree Greedharreejee* v. *Rumanlolljee Gossamee* (3) :

"According to Hindu Law, when the worship of a Thakur has been founded, the Shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution."

A similar principle appears also to have been implied in the judgments of *Jagannath Prasad Gupta* v. *Runjit Singh* (4) ; *Sheoratan Kunwari* v. *Ram Pargash and others* (5) ; and *Musammat Jai Bansi Kunwar* v. *Chattar Dhari Singh* (6).

3. (1889) 16 I A 137 at 144.
4. (1897) I L R 25 C 354.
5. (1896) I L R 18 A 227.
6. (1870) 5 Beng L R 181.

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To apply this law to the present case, Jadulal was the sole heir of his father and, by the general law of India, he thus stood vested with the right of custody of, and management of the trust for the family idol which his father had consecrated and set up. So far as the legal status and rights of Jadulal as grantor of the deed of 1888, the deed proceeds to narrate :—

"Whereas the said Jadulal Mullick is now desirous of dedicating the said premises to the said Thakur in the manner hereinafter expressed."

This is perfectly correct language in acknowledgment of the fact that the Thakur existed and was the capable recipient in law of the property dedicated to it. The deed then proceeds to declare that certain premises, described in the schedule,

"shall be for ever held by the said Jadulal Mullick, his heirs, executors, administrators and representatives to and for the use of the said Thakur Radha Shamsunderji to the intent that the said Thakur may be located and worshipped in the said premises and to and for no other use or intent whatsoever: Provided always that if at any time hereafter it shall appear expedient to the said Jadulal Mullick, his heirs, executors, administrators or representatives so to do it shall be lawful for him or them upon his or their providing and dedicating for the location and worship of the said Thakur another suitable Thakurbari of the same or greater value than the premises hereby dedicated to revoke the trusts hereinbefore contained and it is hereby declared that unless and until another Thakurbari is provided and dedicated as aforesaid the said Thakur shall not on any account be removed from the said premises and in the event of another Thakurbari being provided and dedicated as aforesaid the said Thakur shall be located therein but shall not similarly be removed therefrom on any account whatsoever."

This passage has been quoted in full so as to make clear the three propositions which seem to follow, namely, First, the recognition as mentioned of the idol as the dedicatee : Second, the conveyance in no respect whatever appears to be a conveyance of the idol, but is a conveyance of the premises described in the schedule to and for the use of the idol and for no other use : Third, this use is not to be interfered with by Jadulal's heirs, executors, administrators or representatives except upon providing for the dedicatee another Thakurbari of the same or a larger value. When that is done Jadulal's heirs, etc., could revoke the trusts of the premises affecting the present pujah dalan, and unless and until that is done the idol is not to be removed therefrom.

It is this last proposition which raises the real difficulty in the case and their Lordships express no surprise that the High Court should have felt it. Upon a full consideration their Lordships have come to the conclusion that this was not

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a dedication, in any sense of the word, of the idol as property, nor of the idol at all. It was a dedication of real estate in trust for the idol, recognised as a legal entity, to which such dedication might be made.

The true view of this is that the will of the idol in regard to location must be respected. If, in the course of a proper and unassailable administration of the worship of the idol by the Shebait, it be thought that a family idol should change its location the will of the idol itself, expressed through his guardian, must be given effect to. This is in accordance with what would appear to be the sound principle of the position and it is further in accord with the authority on the subject. In the case already referred to so far did the decision go that it was expressly said by Lord Hobhouse in *Gossamee Sree Greedharreejee* v. *Rumanlolljee Gossamee* (3) : "The Thakur Dowjee, or those who speak for him on earth, need not take advantage of this gift."

A fortiori it is open to an idol acting through his guardian the Shebait to conduct its worship in its own way at its own place always on the assumption that the acts of the Shebait expressing its will are not inconsistent with the reverent and proper conduct of its worship by those members of the family who render service and pay homage to it.

A question was raised whether the right of worship of an idol can be made the subject of partition. Their Lordships have already referred to this point when dealing with the arbitration proceedings.

The point arose especially in the case of *Mitta Kunth Audhicarry* v. *Neerunjun Audhicarry and others* (7). The head note is as follows :—

"The reasons for which one of several joint owners is entitled to a partition of the joint property, apply also to the case of a joint right of performing the worship of an idol. The joint owners of such a right are entitled to perform their worship by turns."

And, in Sir Richard Couch's judgment, the following rule of law is referred to :—

"The suit is founded upon the right of the plaintiff, as property, to a partition. No doubt the plaintiff is entitled to that ; and the decree of the First Court was right in awarding it. But that decree has not made provision for the term that each of the three persons, the plaintiff and the two defendants, should have, and does not state whether the plaintiff is to have his turn first, or second, or third. We must therefore direct the Extra Assistant Commissioner to determine by lot in what order the plaintiff and the two defendants shall exercise the right to worship the idol. And having deter-

3. (1889) 16 I A 137 at 147. 7. (1874) 14 Beng. L R 166.

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mined that, he should insert in his decree, so that it will be settled in what order they are to exercise the right of worship."

The sole objection made in these proceedings to the removal by one of the Shebaits during his pala or turn of worship to his residence is founded upon the deed of 1888 already analysed. In paragraph 13 of the defence "this defendant admits that the plaintiff's turn of worship commenced on and from . . . the 14th April, 1917. On the 2nd April, 1917, this defendant, who had attained majority on or about 20th November, 1914, . . . objected." In the evidence of the first respondent, he deposed as follows :—

"Babu Bhupendra Nath Basu divided the turn of worship of six Thakurs, and each of us have one year........my only objection is based on the deed of dedication ; apart from the deed there would be objection to the removal because the Thakur has its own house where arrangements are made for sheba. I have said that my only objection is on the deed of dedication."

While, however, this is the only objection actually made by the objecting defendant, it has to be pointed out that the idol is not otherwise represented in the proceedings, though the result might conceivably vitally affect its interests. In that sense the contest has related to the establishment of individual rights as between contesting Shebaits. The interests of the female members of the family, especially in view of the fact that they are excluded from the managership of the idols, might need special protection. They are entitled to participate in the worship established by Mutty Lal Mullick without obstruction or inconvenience.

Their Lordships are accordingly of opinion that it would be in the interests of all concerned that the idol should appear by a disinterested next friend appointed by the Court. The female members of the family should also be joined, and a scheme should be framed, for the regulation of the worship of the idols.

Their Lordships will therefore humbly advise His Majesty that the case should be remitted to the High Court to be dealt with in accordance with this report. It will be necessary in these circumstances to set aside the decrees of both the Courts below. The parties must bear their own costs in the Courts of India and before this Board ; any costs paid under either of the decrees of the Courts below will be repaid.

Solicitors for appellants : *Sanderson, Lee and Co.*

Solicitors for respondents : *J. J. Edwards and Co.*

A. de M. *Case remitted : Decree set aside.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Fort William in Bengal.)

PRESENT :—LORD SHAW, LORD CARSON, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI.

Probhudas ... *Appellant**

v.

Ganidada ... *Respondent.*

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Sale of goods—Contract for sale and purchase of imported sugar—Tariff Act (VIII of 1894, as amended by Act IV of 1916), Ss. 3 and 10—Government reduction in tariff valuation of imported sugar after date of contract—Claim by buyer for refund by seller of excess duty—Alleged constructive decrease or remission of duty.

A modification by Government under S. 3 (2) of the Tariff Act (VIII of 1894, as amended by Act IV of 1916) of the tariff value of (but not the rate of duty chargeable on) an imported article, subsequent to a contract between dealers for the sale and purchase of the article does not entitle the buyer, under S. 10 of the Act, to recover from the buyer the amount representing the excess duty paid on the article.

A mere change of tariff values without any change in the rate of duty does not constructively change the duty on an article.

Appeal from a decree of the High Court in Appellate Jurisdiction (8th August, 1924) confirming a decree of the same Court, original jurisdiction (1st August, 1924) upon a special case submitted under S. 90 and O. 36 of the Civil Procedure Code, 1908.

The appellant in December, 1922, entered into the two following contracts to buy from the respondent white Java sugar as under :—

(*a*) Contract, dated 15th December, for 237 1|2 tons at Rs. 14-1-0 per maund, delivery ex godown S. S. "Calcutta" expected then to arrive in her next trip to Calcutta.

(*b*) Contract, dated 18th December, for 225 tons at Rs. 14-6-0 per maund, delivery ex godown during January, February and March, 1923, in equal monthly quantities.

Both contracts were duly carried out and paid for. The Government of India, by a notification, dated the 23rd December, 1922, reduced, under S. 3 (2) of the Tariff Act (VIII of 1894, as amended by Act IV of 1916), the tariff valuation of imported sugar from Rs. 26-4-0 to Rs. 16-4-0 per cwt. as from 1st January, 1923, but the rate of duty, viz., 25 per cent on the tariff value, remained unaltered. The

*P. C. Appeal No. 168 of 1924. 27th March 1925.

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appellant claimed that he was entitled to the benefit of th constructive reduction in the amount of duty by virtue of th aforesaid reduction in the tariff value, and on the 5th May 1924, a special case under S. 90 and O. 36 of the Civil Proce dure Code, 1908, was submitted for the decision of the Higl Court. The High Court in original jurisdiction distinguishe between " duty " and " tariff value " in the Act, and held tha a decrease in the latter did not imply a reduction in the forme and that consequently the buyer (appellant) was not entitle to any refund. This decision was upheld upon appeal upo the ground that both parties must be assumed to have entere into the contracts with full knowledge of the average valu of Rs. 16-4-0 which had been notified as the probable averag value for the next calendar year by the Government of Indi on the 21st October, 1922, and that when the appellant pai in 1923 for the sugar without making any deduction from th contract price, he recognised that he had no claim for a d duction.

The appellant appealed to His Majesty in Council.

W. Wallach for appellant.

Sir G. Lowndes, K. C. and *E. B. Raikes* for respondent.

27th March, 1925. The Judgment of the Board w delivered by

Lord Shaw.

LORD SHAW :—The Courts below agreed. The questic which arises has reference to the taxation upon sugar and t point involved is represented to be of very great gener importance to all mercantile communities in India which de with that article.

Their Lordships are satisfied that both the Courts belo have come to a just conclusion.

From the documents produced with the stated case it clear that the subject of sugar taxation, and particularly t methods of its imposition, have been for some time a matt of concern to the dealers in the articles and of communicati with the Government of India.

It is to be noted that in 1911 a letter was addressed by t Under Secretary to the Indian Government Department Commerce and Industry to the Secretary of the Bengal Cha ber of Commerce at Calcutta. The letter noted previo correspondence and in particular that it had been represent by the Karachi Chamber of Commerce, supported by the Beng and Bombay Chambers of Commerce that reconsiderati

should be given to the then existing system. "It was represented," says Mr. Irwin's letter, "that, in the opinion of the Bengal Chamber of Commerce, the present system of fixing the tariff valuation of sugar, under which merchants have to make forward contracts in ignorance of the tariff value, was unsatisfactory, and that there was a strong and unanimous feeling amongst importers that the present system should be changed."

This request was acceded to. It was intimated that the Government of India had decided to fix the tariff valuation of sugar on the average price of one year from 1st October to 30th September. It was added that the necessary instructions would be issued to the Director-General of Commercial Intelligence to publish as early as possible a statement giving the information already available for the current year. In result, accordingly, monthly statements of average value per maund were issued and published in the Gazette and the definite Government value of sugar struck on the average prices calculated on the monthly returns as there described was to be fixed and officially intimated.

On the 21st October, 1922, the supplement to the *Gazette of India* contained the notification, the effect of which is in question in this case. It notified that "returns have been received from October, 1921, and the average value of Java 23 Dutch Standard and above for the 12 months, October, 1921, to September, 1922, is notified below." The average nett value per cwt. is stated as Rs. 16 annas 4. There is then added the following :—

"The tariff valuation of sugar for each calendar year is fixed on the average nett market price ruling during the previous 12 months ending September. The above statistics are published in order to enable merchants to determine the probable tariff valuation of the next calendar year."

From that date forward accordingly merchants were notified of the probable tariff valuation, and the object aimed at by the Chamber of Commerce in providing the convenience to merchants in making forward contracts was thus secured. There had been great variations of prices and the intimated tariff valuation of Rs. 16 annas 4 was a reduction by Rs. 10 from its former figure of Rs. 26 annas 4. By a notification, dated 23rd December, 1922, issued by the Government of India the reduction—which had thus been in October anticipated as probable—took place ; the tariff valuation of imported sugar was reduced as stated with effect from the 1st January, 1923. It was admitted in the High Court by counsel

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for the appellant that the appellant must have had information of the notification of the previous October, and it seems out of the question to suggest that the contracts for sugar made in the succeeding December were not made by both well-known merchants in view of that published fact.

These contracts were made on the 15th and 18th December, 1922, the former for 237 1|2 tons of white Java sugar and the latter for 225 tons of the same article, the goods to be delivered ex godown S. S. "Calcutta." The goods arrived in January under the first contract, and in January, February and March under the second, and they were settled and paid for between the parties. A question possible in the case was as to whether the transactions were not thereby definitely closed; but the point has not been raised in view of the importance of the other matter now to be alluded to.

The buyer claims, in this litigation, a right to deduct, as against the seller, from the prices paid by him, the equivalent of a decrease of duty. The Government duty as such has not been decreased, but the buyer claims that it has constructively been decreased because, as the duty was fixed upon the basis of a tariff valuation and that tariff valuation has been reduced, therefore—such is the argument—he must take the same duty applied to a smaller tariff valuation, and so constructively reckon that there is a decreased duty upon the goods sold.

Their Lordships agree with the Courts below in holding that there is no justification for such an operation.

The contention depends upon the provisions of S. 10 of the Indian Tariff Act VIII of 1894. The material part thereof, as amended by subsequent Acts, is as follows :—

"In the event of any duty of customs on any article being decreased after the making of any contract........for the sale of such article duty paid where duty was chargeable at that time—

* * * * * *

(b) if such decrease so takes effect that the decreased duty only is paid the purchaser may deduct as much from the contract price as will be equivalent to the decrease of duty and he shall not be liable to pay or be sued for or in respect of such deduction."

So far in regard to "duty."

With regard to the other topic as to tariff valuation, that is dealt with by the Indian Tariff Amendment Act IV of 1916, in the following terms :—

"3. (2) The Governor-General in Council may by notification in the *Gazette of India* fix for the purpose of levying the said duties, tariff values

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of any articles enumerated either specifically or under general headings in the said schedules as chargeable with duty *ad valorem* and may alter any tariff values for the time being in force."

These citations are made in order to show that the tariff values and their taxation are, of course, totally different from the duties and their levying. The former is matter of intelligent anticipation, based upon such knowledge of price variations as was available, and the desire for this knowledge was acquiesced in by the Government of India for the convenience of merchants. Their Lordships do not doubt that that convenience occurred in the present instance. The tariff value basis being thus anticipated, contracts are made ; and, when the duty is not changed, these contracts take stock of the position with complete accuracy and there is no occasion in reason for any subsequent re-adjustment as between buyer and seller. But " duties " are in a different position. Their rate remains the subject of Government and administrative action. The parties who make forward contracts are not apprised of such changes, but have to wait for budget announcements. It is in this latter case that the Indian Act comes in to declare (to keep to the case in hand) that a change in the duty by decrease, the duty having been imposed between the making of the contract and the delivery of the goods, may be the ground of a claim by the buyer.

A change of duty means a change in the rate of duty. Their Lordships are of opinion that, there having been no change whatsoever in the rate of duty in the present case, the contention that a change of tariff values of sugar is constructively a change in the sugar duty is without justification. The rate of duty was not reduced. But suppose—to test the matter—suppose that the rate of duty had been reduced, and that the tariff values had also been reduced, the buyer would, then, be claiming two different reductions, one in respect of actual duty and a second in respect of a constructively reckoned duty. The Act could not mean that. To bring in tariff values into the question of increase or reduction of sugar duties, is to introduce an improper and confusing element into the construction of the taxing Act.

Their Lordships will humbly advise His Majesty that the appeal should be disallowed with costs.

Solicitors for appellant : *Ranken, Ford* and *Chester.*

Solicitors for respondent : *T. L. Wilson and Co.*

A. de M. *Appeal disallowed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Patna.)

PRESENT:—LORD SHAW, LORD CARSON, SIR JOHN EDGE AND MR. AMEER ALI.

A. H. Forbes ... *Appellant**

v.

L. E. Ralli and others ... *Respondents.*

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A. H. Forbes *v.* L. E. Ralli.

Estoppel—Evidence Act, S. 115—Registered lease-deed—Subsequent statement by the lessor's agent that the lease was a permanent one and entitled the lessee to erect buildings—Suit to evict the lessee from the demised land—Equitable estoppel.

The lessee of certain properties held them under a registered lease deed executed by the lessor's agent on the 22nd June, 1894; subsequently the then agent of the lessor on his behalf wrote to the lessee on the 31st December, 1903, a letter in which he stated "the lease executed by Mr. A. (the prior agent of the lessor), dated the 22nd June, 1894, is a permanent lease and gives you the right to erect buildings, but it does not entitle you to hold at a fixed rate, and the rent is liable to enhancement after proper legal notice." The lessee by reason thereof subsequently erected permanent buildings upon the demised lands. In a suit to evict the lessee: *Held,* without deciding the question whether the lease was originally a permanent lease or not that the landlord was estopped from evicting the lessee from the demised land. The statement in the letter is a statement of fact giving rise to an estoppel against the lessor that the lease was a permanent one and that under it the lessee was entitled to erect buildings.

Ramsden v. *Dyson,* L R 1 H L 129, *Ahmad Yar Khan* v. *The Secretary of State for India,* 28 I A 211 and *Sarat Chunder Dey* v. *Gopal Chunder Laha,* 19 I A 203 followed.

Appeal from a decree of the High Court (17th May, 1922) reversing an ejectment decree (19th July, 1921) made by the same Court (Ross, J.) on second appeal from the decree of the Munsif of Araria (16th September, 1918) dismissing the appellant's suit.

The facts and arguments sufficiently appear from the judgment of their Lordships.

L. de Gruyther, K. C. and *K. Brown* for appellant.

Sir John Simon, K. C., A. M. Dunne, K. C. and *S. Hyam* for respondents.

3rd April, 1925. The Judgment of the Board was delivered by

Mr. Ameer Ali.

MR. AMEER ALI.—This appeal arises out of a suit brought by the plaintiff-appellant in the Court of the Munsif at

*P. C. Appeal No. 5 of 1924. 3rd April, 1925.

Araria in the district of Purnea to evict the defendants from certain lands he had leased to them in the year 1894.

The suit was dismissed by the Munsif, as will be more particularly mentioned later in the course of this judgment. The Munsif's order was affirmed by the District Judge. The plaintiff preferred an appeal to the High Court, which was heard by a single Judge, Mr. Justice Ross, who reversed the judgment of the District Judge, and decreed the plaintiff's claim. On the defendants' appeal under the Letters Patent, a Division Bench, consisting of the Chief Justice and Mr. Justice Mullick, reversed the decision of Mr. Justice Ross, and agreeing with the District Judge, dismissed the suit of the plaintiff. He now appeals to His Majesty in Council on the grounds that the High Court misconstrued the terms of the lease under which the defendants were let into possession, and have wrongly applied, under the circumstances of the case, the doctrine of estoppel in respect of his claim.

A brief narration of the facts which have led to this unfortunate litigation will explain the position of the parties.

Mr. Forbes, the plaintiff, owns considerable landed property in the district of Purnea. The defendants are Greek merchants trading largely in country produce in India under the name and designation of Ralli Brothers. On the 22nd June, 1894, the defendants' agent, one Acatos, obtained from the plaintiff a lease of four bighas of land "for the purpose of erecting buildings, putting up presses, etc., for trading." The lease (Ex. 5) is in English. Acatos executed a kabuliat which is identical in terms with the lease. As the question for determination turns, in a great measure, on the words of this lease, their Lordships think it desirable to give, so far as is necessary, the actual language of Ex. 5. It is as follows :—

"That whereas land is required by Mr. C. Acatos, Agent of Messrs. Ralli Brothers, Merchants, of Calcutta, for the purpose of erecting buildings, putting up presses, etc., for trading, I, A. T. Ricketts, Manager for A. H. Forbes, Executor to the Estate of the late A. J. Forbes, agree to give a lease of four bighas of land to the aforesaid Mr. C. Acatos for the above purpose from year to year at an annual rental of Rs. 45 per bigha or total annual rental of Rs. 180."

Admittedly the defendants took possession of the leased lands for the purposes stated in Ex. 5. In 1903 a gentleman of the name of Carras took the place of Mr. Acatos as the local agent of Ralli Brothers at Purnea. So far as appears

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from the record, he resided at a place called Forbesganj, which had been established by the plaintiff or his father as the centre of his estate. A railway station had been opened close by, and Forbesganj acquired a certain importance.

About this time circumstances appear to have arisen which necessitated the erection of a pucca or masonry building for the residence of Mr. Carras. As the lease, to use the language of the District Judge, was somewhat vaguely phrased, the defendants, Ralli Brothers, considered it expedient to obtain the plaintiff's express permission for the purpose of erecting the structure they proposed for their agent. At this time a Mr. Duff was acting as Mr. Forbes' manager or agent.

After going carefully through the evidence, their Lordships have no doubt that both the Munsif and the District Judge have correctly held that at the interview which took place in consequence of the defendants' applications for permission to raise the structure they proposed, and at which the terms of the lease of 1894 were discussed, Mr. Forbes was personally present. In his evidence in the Munsif's Court the plaintiff states that he does not remember whether he was present or not. Mr. Carras positively swears that he was present and, in fact, took part in the discussion. Mr. Duff, for some reason or other, has not been examined on behalf of the plaintiff. If, as it is said, he was ill at the time and unable to attend, he could have been examined, as the lower Courts point out, on commission.

Their Lordships are thus left face to face with two statements, one by Mr. Forbes saying that he does not remember, the other by Mr. Carras, who positively swears that Mr. Forbes was present.

In their Lordships' opinion, the Courts which were by law vested with the jurisdiction to deal with the facts have properly come to the conclusion that Carras' statement should be accepted. The letter of the 31st December, 1903 (Ex. A), which Duff wrote to Carros, is clear and precise on this point. Mr. Duff, writing as manager of the Sultanpur Estate, namely, the plaintiff's estate, says as follows :—

"My dear Carras,

"Referring to your conversation of this morning with Mr. Forbes and myself, I write (?) at your request to say that the lease executed by Mr. C. Acatos, dated the 22nd June, 1894, is a permanent lease and gives you the right to erect buildings, but it does not entitle you to hold at fixed

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rate, and the rent is liable to enhancement after proper legal notice. If your firm desires to have a permanent lease at a fixed rate of (torn) will be glad to see the proposed draft of lease and to show it to Mr. Forbes. In the meantime, you can commence the house if you like to do so."

With reference to this letter the plaintiff has raised a number of objections which appear to their Lordships to be feeble and untenable. In the first place, he says that it was a private letter. The District Judge held, as their Lordships think rightly, that it is an official letter written by Duff in his capacity as manager. It is precise in its language and tells the defendants that the lease of June, 1894, is "a permanent lease and gives you the right to erect buildings, but it does not entitle you to hold at fixed rate and the rent is liable to enhancement."

The defendants appear to have paid a bonus or *nazarana* for the permission to raise the structure they proposed, and on the 10th January, 1904, a "parwangi" was issued from the plaintiff's zemindari cutchery in the Hindi language, the vernacular of the Province, giving the sanction for the erection of the building. The parwangi, as it is called, requires some attention. Its translation is as follows :—

"To the Manager.

"Permission granted to Messrs. Ralli Brothers, Goledar of Gola at station Forbesganj, Pargana Sultanpur.

"Whereas you prayed through the agent of the said Gola for permission to erect a Pucca house in your Bandobasti (settled) Gola. As on enquiry and measurement you wish to erect a house on 2 C. 15 Dhurkis of land on payment of Rs. 21 as Nazarana per mensem, and the said sum has under a Chalan been deposited through your agent in the estate. Therefore permission is granted to you to erect a masonry house on 2 C. 15 Dhurkis of land in your Bandobasti (settled) Gola. A Nazarana (bonus) of rupees twenty per Cottah will be taken in case more land is occupied in constructing the Pucca house. All rights which you possess in your Bandobasti (settled) Gola land under the Patta and Kabuliat will remain intact. No other right will be created under this permit. This Parwangi (sanction) or permission is intended for the said house only. Dated the 10th January, 1904, Sultanpur."

Considerable stress was laid by plaintiff's counsel on the words which appear towards the end of this document—"No other right will be created under this permit"; and it was urged that the intention of the plaintiff was to restrict the rights of the lessee within the limits imposed by the original lease of 1894. Mr. Carras deposes that he does not know the Hindi language and did not, therefore, know of the terms of this document until some time after, and that he took it to

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be an acknowledgment of the bonus that he had paid. This statement has been accepted by both the Munsif and the District Judge. In their Lordships' opinion, in whatever way this document may be understood, it does not affect in any degree the effect of what took place at the interview with Mr. Forbes and Mr. Duff, the result of which is embodied in (Ex. A) the letter of the 31st December, 1903.

Acting on the suggestion contained in the letter of Mr. Duff of the 31st December, 1903 (Ex. A), viz., that if the defendants desired to have a permanent lease at a fixed rate (of rent), he would be glad to see a proposed draft of lease and to show it to Mr. Forbes, the defendants appear to have instructed their solicitors, Messrs. Sanderson and Co. to prepare the necessary draft.

From the document, to which reference will be made presently, it appears that Sandersons' applied to Mr. Forbes for the production of a number of papers which they wished to inspect before preparing the draft.

The defendants have put in the reply of Mr. Duff to this application of Messrs. Sanderson and Co., but not the letter Sanderson and Co. wrote to Mr. Forbes.

The plaintiff's advisers appear to have produced in the Munsif's Court a certain paper which, for purposes of identification, appears to have been marked " X. " It was alleged that that was the communication in question, but they failed to prove the signature and naturally it was not admitted in evidence.

Another effort was made in the first Court to introduce the paper in question among the exhibits. They again failed to prove it. No question regarding the non-admission of this paper was raised before the District Judge or in the High Court. Although in the appeal to the High Court twenty-three grounds were taken, not one relates to it ; nor is there any reference to this rejected letter in the grounds for leave to appeal to His Majesty's Council in the case lodged by the plaintiff before the Registrar.

Their Lordships are of opinion that there is no substance in the present contention relative to what is called " X."

Coming to the letter addressed by Duff to Messrs. Sanderson (Ex. A1), it bears date the 23rd January, 1904, and is in these terms :—

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"Sirs,

"With reference to your No. 392 of 13th instant to the address of Mr. A. H. Forbes, I am desired by him to inform you that matters of greater importance than the lease of a few bighas of land are constantly transacted in this estate without the production of such papers as you wish to inspect. There are no special title deeds for the plot of land which Messrs. Ralli Brothers have held for the last nine years, and if Mr. Forbes had no title, it follows that Messrs. Ralli Brothers have also had no title for the past. Mr. Forbes, therefore, declines to produce such valuable papers as he holds, and considers that the existing lease, with the addition of the sanction recently given to erect the building, is sufficient for all requirements."

This being the position of the parties, the point for determination resolves itself into a simple question of fact. There can be no question that upon the letter (Ex. A) of the 31st December, 1903, the defendants commenced the building for the residence of their agent and completed it at considerable expense. Mr. Forbes knew of it and frequently visited the place. No question was raised until 1916. In that year the plaintiff's zemindari cutchery (estate office) was burnt down. He demanded contributions from his tenants to rebuild the cutchery. They all agreed to pay except the defendants, who stood on their rights. It was then that the question of their eviction was first mooted. His evidence, long and involved as it seems to their Lordships, appears thoroughly consistent with the view taken by the District Judge.

Both the Munsif and the District Judge, in view of the purpose for which the lease was granted and the surrounding circumstances to which they refer in their judgments, were of opinion that the demise in its inception was of a permanent character, save and except as to the rate of rent ; and that the words "from year to year" did not affect the permanent character of the lease, but only gave expression to the provision that the rent was variable from year to year upon proper notice. They also held that the plaintiff was estopped by his acts and representations from questioning the permanency of the tenure.

In the view their Lordships take of the case, they do not think it necessary to determine whether in its inception the lease created a permanent tenure, for they fully agree with the Courts in India that the plaintiff is estopped from interfering with the defendants' right to hold the land.

The doctrine of estoppel which the Courts in India, save and except Mr. Justice Ross, have applied to the claim of the

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plaintiff is embodied in S. 115 of the Indian Evidence Act of 1872. It is as follows :—

" When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing."

The Munsif and District Judge have rightly held, in their Lordships' opinion, that the statement in Ex. A is a statement of fact and not an expression of opinion, as is contended by the plaintiff. The plaintiff distinctly represented to the defendants' agent, Carras, that the lease granted in 1894 was a permanent lease, and that under it he was entitled to erect buildings, as the lease distinctly stated ; but that there was no fixity of rent. It has been urged on behalf of the plaintiff that it was a yearly tenancy, and to hold that the plaintiff was estopped by his conduct as evinced by the letter of the 31st December, 1903, from enforcing eviction, would be tantamount to creating a new contract. It is said also that the contract of 1894 was a registered document, and no variation or alteration or change can be made in it except by a registered contract. The defendants did not contend that it was a new contract or ask for a new contract ; nor have the Courts in India held that estoppel creates a new contract. Estoppel prevents the plaintiff from evicting from their holding the defendants, whom he, the plaintiff, induced by his representation and conduct to believe that they had a fixity of tenure, although not of rent, in the lands that had been leased to them. It gives effect to the representation that induced them to act as they did.

In the case of *Ramsden* v. *Dyson* (1) the principle which governs this class of case is stated by Lord Kingsdown in the following terms :—

" The rule of law applicable to the case appears to me to be this : If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to

1. L R 1 H L 129.

give effect to such promise or expectation. This was the principle of the decision in *Gregory v. Mighell*, and, as I conceive, is open to no doubt."

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This principle has been accepted by this Board in the case of *Ahmad Yar Khan* v. *The Secretary of State for India* (2).

The exposition by Lord Shand in *Sarat Chunder Dey* v. *Gopal Chunder Laha* (3) of the rule of equitable estoppel embodied in S. 115 of the Indian Evidence Act has been quoted *in extenso* in the judgment of the learned Chief Justice in the present case, and does not need repetition. Their Lordships desire to record their full concurrence with the principle there laid down.

They do not consider it necessary to refer to all the authorities that have been cited on both sides, as they think that the views expressed by Lord Kingsdown and Lord Shand completely answer the contentions of the appellant. Upon a review of the facts as well as of the authorities, their Lordships have come to the conclusion that the judgment of the High Court is right and that this appeal should be dismissed with costs, and their Lordships will humbly recommend His Majesty accordingly.

Solicitors for appellant : *Barrow, Rogers and Nevill.*

Solicitors for respondents : *Sanderson, Lee and Co.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL

(On Appeal from the High Court of Judicature at Allahabad.)

PRESENT :—LORD ATKINSON, LORD CARSON AND SIR JOHN EDGE.

Musammat Bhagwani Kunwar and another ... *Appellants**

v.

Mohan Singh and others ... *Respondents.*

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v.
Mohan Singh.

Hindu Law—Joint-family—Alleged separation—Entries of names of members in village-papers, Collectors' books, etc.—North-west Provinces Land Revenue Act (XIX of 1873)—Burden of proof of separation.

2. (1901) 28 I A 211. 3. (1892) 19 I A 203.

*P. C. Appeal No. 94 of 1923. 7th May, 1925.

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Mere definition of shares of individual owners in revenue and village papers is not conclusive in law that the family, to which such definition refers, separated.

Nageshar Baksh Singh v. *Ganesha*, 47 I A 57 ; *Bhagoji* v. *Bapuji*, I L R 13 Bomb 75 ; *Fatma* v. *Darya Sahib*, 10 Bom H. C. 187; and *Gajendar Singh* v. *Sardar Singh*, I L R 18 All 176 followed.

The North-west Provinces Land Revenue Act (XIX of 1873) does not make such definition in a settlement *Khewat* conclusive of the fact of the separation of the joint Hindu family concerned.

The burden of proof of separation is on those who allege that the members of a joint Hindu family became divided.

Appeal from a judgment and decree (18th March, 1920) of the High Court (Sir G. Mears, C. J. and Banerji, J.) which reversed a judgment and decree (30th November, 1916) of the Subordinate Judge of Cawnpore (B. L. Prasad, Esq.).

The facts and arguments are fully set out in the judgment of their Lordships.

L. de Gruyther, K. C. and *J. M. Parikh* for appellants.

Sir G. Lowndes, K. C. and *W. Wallach* for respondents.

7th May, 1925. The Judgment of the Board was delivered by

Sir John Edge.

SIR JOHN EDGE.—This is an appeal by defendants from a decree, dated the 18th March, 1920, of the High Court at Allahabad, which reversed a decree, dated the 30th November, 1916, of the Subordinate Judge of Cawnpore, by which the suit had been dismissed.

The suit in which this appeal has arisen is a suit in which the plaintiffs claimed a decree for the proprietary possession of an eight-anna share in each of the villages of Auria (Auria Tikra) and Aurangpur Gahdewa and certain fractional shares in four other zemindari villages in the Cawnpore District by dispossession of the defendants, who were in possession and denied the title of the plaintiffs. The Subordinate Judge dismissed the suit ; the High Court on appeal gave the plaintiffs the decree for the possession which they claimed. The parties were Hindus of the Thakur Gaur caste and were subject to the law of the Mitakshara. The following pedigree will sufficiently show how the parties were related, but their Lordships do not know which of the brothers Madho Singh and

Hira Singh, or of the brothers Diwan Singh and Bahadur Singh, was the elder :—

Padum Singh.

- Madho Singh (died 1867).
  - Gulab Singh (died 2nd December, 1886) = Kanchan Kunwar (died 8th March, 1914).
    - Bhagwani Kunwar, Deft. = Jagannath Singh, Deft. (died pending the suit).
      - Sheorakham Singh, Deft.
- Hira Singh (died 1862).
  - Diwan Singh.
    - Pancham Singh, Plaintiff.
      - Harnam Singh, Plaintiff.
      - Hargobind Singh, Plaintiff.
      - Jaichand Singh, Plaintiff.
  - Bahadur Singh.
    - Mohan Singh, Plaintiff.
    - Chandan Singh, Plaintiff.
  - Niwaz Singh.
    - Surat Singh, Plaintiff.
    - Girand Singh.

The suit was brought on the 12th November, 1914, in the Court of the Subordinate Judge of Cawnpore after the death of Musammat Kanchan Kunwar. When the suit was brought Bahadur Singh was about 80 years of age and Niwaz Singh was about 76 years of age. As Diwan Singh was not a party to the suit, although his son Pancham Singh was a plaintiff, their Lordships have assumed that Diwan Singh was then dead. The most material question in the suit is whether Gulab Singh was, when he died, joint with, or separate from, his cousins Diwan Singh, Bahadur Singh and Niwaz Singh.

Padum Singh and his sons Madho Singh and Hira Singh admittedly had constituted a joint Hindu family. Padum Singh died before his sons, and at his death Madho Singh and Hira Singh were joint. It is well-established law that those who allege that the members of a joint Hindu family had separated must prove, unless it is admitted, that there was a separation at some material time. That material time in this case must have been before the death of Gulab Singh. Hira Singh had died in 1862, and Madho Singh had died in 1867. Gulab Singh died sonless in 1886. The case of the plaintiffs was, and is, that Gulab Singh was until he died a member of the joint family, which, until he died, consisted of the then living male descendants in the male line of Padum Singh. The case of the defendants, appellants, is that Madho Singh and Hira Singh had separated, and consequently that Gulab Singh was separate from his cousins Diwan Singh, Bahadur Singh and Niwaz Singh. It happened in 1896 or in 1898

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that the then members of the joint family separated. That separation did not take place at a material time so far as this suit is concerned, but the learned Subordinate Judge incorrectly held that the separation in 1896 or 1898 shifted the burden of proof, and that it was for the plaintiffs to prove that Gulab Singh was joint when he died in 1886. How far that misunderstanding of the law affected the Subordinate Judge in his consideration of the evidence in this suit, it is impossible to say, but he found on the evidence that Gulab Singh was separate at the time of his death. The High Court found on the evidence that Gulab Singh was, when he died, a member of the joint family.

Their Lordships will later express the conclusion at which they have arrived as to whether there had or had not been a separation before Gulab Singh died, but before doing so they will refer to another question which must be considered, although they agree with the conclusions at which the Courts below were in agreement on that subject. Their Lordships will now briefly state what that other question is.

The property in question in this suit came into the possession of Kanchan Kunwar shortly after the death of her husband Gulab Singh. The question which their Lordships will first consider is how and in what right did Kanchan Kunwar obtain and hold possession. That property had been entered in the revenue and village papers in the name of Gulab Singh, and Kanchan Kunwar, as his widow claimed to be entitled to the possession of it. That claim could not be maintained unless Gulab Singh had died as a separated Hindu. That claim by Kanchan Kunwar was, in fact, made, and she got possession, but, according to the case of the plaintiffs, she was allowed by Diwan Singh, Bahadur Singh and Niwaz Singh, who were then of age, to take possession under an agreement of compromise made between her and them, by which she was allowed possession of the property for her life for her maintenance, and not as property of which she had any right to the possession.

Gulab Singh was older than his cousins Diwan Singh, Bahadur Singh and Niwaz Singh, and after Hira Singh and Madho Singh had died he was the head of the family, and appears to have acted generally as the family manager, and some villages which were purchased after the death of Madho Singh with the income of the ancestral villages of the family

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were purchased in the name of Gulab Singh. During Gulab Singh's lifetime his wife Kanchan Kunwar must have occupied a position of some importance in the family, and after her husband's death she doubtless wished to manage her own affairs independently of any interference by her husband's relations.

It has not been asserted in argument before their Lordships in this case, or, so far as they are aware, in any case before the Board, and they believe that it could not with truth be asserted before an Indian Court, that a widow of a sonless prominent member of a Hindu joint family is never allowed by the family to occupy possession of some of the family's land for her life for her maintenance. Their Lordships find that Kanchan Kunwar obtained possession of the lands in question under that agreement of compromise for her life for her maintenance, and not in any right of hers as Gulab Singh's widow. The agreement of compromise was an oral agreement, but there is documentary evidence which is only consistent with such an agreement, and to some of that documentary evidence reference will now be made.

During Gulab Singh's lifetime his name had been entered in the revenue papers as that of the owner in possession of shares in some villages, and the names of his cousins Diwan Singh, Bahadur Singh and Niwaz Singh had been entered in the revenue papers as the names of the owners in possession of shares in the same or other villages. When Gulab Singh died it was necessary that application for mutation of names should be made to the revenue authority of each village in the revenue papers of which his name had been entered as the owner of a share or shares. Such applications are made by or on behalf of the person or persons claiming to be entitled to the share or shares of the deceased shareholder, and when opposed an inquiry is held by an official of the revenue authority.

An application for mutation of names was made on Gulab Singh's death in the case of each village in which his name was entered in the revenue papers as the holder of a share. Those applications were made by Diwan Singh, Bahadur Singh and Niwaz Singh, and as Kanchan Kunwar was known to be a claimant for mutation of name her deposition was taken. Their Lordships will now refer, by way of illustration, to what happened in the case of the village of Aurangpur Gahdewa, in

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respect of which the name of Gulab Singh was entered in the settlement khewat of 1873 as the owner of an eight-anna share.

"No. 741 C.—APPLICATION OF BAHADUR SINGH, ETC.

"Name of village—Aurangpur Gahdewa, pargana Bilhour. Head—mutation on the ground of succession.

"Substance.—Application for expungement of the name of Gulab Singh, deceased, and entry of the name of Bahadur Singh, Diwan Singh and Niwaz Singh, cousins, in respect of an 8-anna zemindari share under S. 97, Act No. 19 of 1873.

"SHOWETH :—

"That Gulab Singh, zemindar of an 8-anna share in village Aurangpur Gahdewa, pargana Bilhour, died on the 7th of Aghan Sudi, Sambat 1942. These three cousins, Bahadur Singh, Niwaz Singh and Diwan Singh, are the heirs in possession of the property of the deceased in equal shares. He has left no issue besides these applicants. It is, therefore, prayed that the name of the deceased may be removed from, and those of these heirs entered in, the public records.

"PETITIONERS :—Bahadur Singh, Diwan Singh and Niwaz Singh, heirs of Gulab Singh, zemindar of village Aurangpur Gahdewa, pargana Bilhour, Dated the 12th February, 1887.

"Filed by Diwan Singh and written by Ram Narayan.

"(Sd.) DIWAN SINGH, in autograph.

"This application was made to-day by Diwan Singh.

"Held.—Let the Registrar Kanungo first make a report as to the correctness of the share. 12th February, 1887.

"Signature of Naib-Tahsildar."

The application is in the vernacular. The term which has been translated as "heirs" must mean not heirs in the English acceptation of the term but the persons who claimed as surviving co-sharers of Gulab Singh to have their names entered.

On the 4th April, 1887, Kanchan Kunwar made her deposition before the Kanungo. So far as is material it was as follows :—

"Gulab Singh, my husband, the zemindar of mauza Aurangpur Gahdewa, pargana Bilhour, died a natural death, four months ago. The deceased left no son. Regarding the entry of name in respect of the property left by the deceased husband, some points have been agreed to be settled between Diwan Singh, Bahadur Singh and Niwaz Singh and me. For the settlement of the same I have sent for Jagannath Singh, my son-in-law, from mauza Katra, district Banda. On his arrival, the points will be settled mutually in a week and then my general-attorney, Roshan Lal, will present himself and will make statement about the mutation of names in this case. So long as the points are not settled mutually, I cannot make any statement about the entry of name in respect of the property of the deceased."

Subsequently Musammat Kanchan Kunwar made another deposition in the presence of the Kanungo in relation to entering the names in respect of Aurangpur Gahdewa, which, as translated, was, so far as is material, as follows :—

"The points which were to be settled between Diwan Singh and others and me have all been settled and, under the mutual agreement, the entire property left by my deceased husband in mauza Aurangpur Gahdewa, pargana Bilheur, has been allotted to me and put in my possession. Therefore, the name of the deceased may be struck off and my name entered in respect of the entire property left by the deceased in the said village. Diwan Singh, Bahadur Singh and Niwaz Singh, the heirs of the deceased, have no connection with the property in the said village in my lifetime.

"Signature of Qanungo."

The words "Diwan Singh, Bahadur Singh and Niwaz Singh, the heirs of the deceased, have no connection with the property in the said village in my lifetime" can only mean that Kanchan Kunwar was allowed to be in possession for her life for her maintenance. The learned Judges of the High Court in their judgment observed in reference to that deposition of Kanchan Kunwar :—

"It may be remembered that there is always a reluctance among members of a Hindu family to confer on female members an absolute interest in property belonging to their husbands or fathers, and had it been intended that Kanchan Kunwar was to have an absolute interest in the property which was to be recorded in her name, that fact would have been distinctly stated in the depositions not only of Kanchan Kunwar herself, but also of the male members of the family whose statements were also recorded in the mutation proceedings. We are, therefore, unable to hold that Kanchan Kunwar acquired an absolute interest under the compromise which was effected after the death of Gulab Singh."

Musammat Kanchan got possession of the shares in the villages in question under that agreement of compromise and she never had any other right or title to them, and she could not under the circumstances obtain against the co-sharers of the joint family any title by prescription. It has, however, been suggested in this appeal that she had acquired a title by prescription. Whether she acted in accordance with that agreement of compromise or contrary to it is immaterial ; she had no other title to the villages in question and could grant or convey no title of any kind to the villages which would be effective for any purpose beyond the term of her own life.

Musammat Kanchan Kunwar, as appears by her deposition of the 4th April, 1887, wished to consult her son-in-law Jagannath Singh on the subject of the agreement of compromise. As will now appear, her son-in-law, Jagannath Singh,

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who was a defendant in this suit and is now dead, but is represented by his son Sheorakham Singh, must have had with his wife Bhagwani Kunwar, who was Kanchan Kunwar's daughter, much influence over Kanchan Kunwar. On the 12th May, 1892, Musammat Kanchan Kunwar by a deed purported to give the eight-anna share in the village Auria to her daughter Bhagwani Kunwar. In that deed Musammat Kanchan Kunwar asserted that on the death of Gulab Singh she had entered into proprietary possession of the eight-anna share, and that on her death her daughter "would succeed to the whole of the estate of my husband Gulab Singh under the Hindu Law."

Their Lordships may here observe that Kanchan Kunwar, in a written statement which she had filed in Court on the 26th January, 1888, in a suit in which she was a defendant, had alleged that "the property of Gulab Singh deceased was taken by Bahadur Singh, Diwan Singh and Niwaz Singh, and they became liable for the entire amount payable and for collection of the outstanding debts, while this defendant got for her maintenance the shares in the zemindari property specified at the foot. In these circumstances the defendant and the shares specified at the foot should be exempted." At the foot of her written statement she specified the shares in the six villages in question in this suit, including the eight-anna share in mauza Auria.

On the 12th August, 1892, Musammat Kanchan Kunwar executed a deed of mortgage in favour of her son-in-law, Jagannath Singh, by which she purported to mortgage all the rest of the property of which she had been allowed under the agreement of compromise to take possession for her life for her maintenance. In that deed she asserted that all the properties she was mortgaging "are up to this time owned and possessed by me as proprietor without the participation of any one else, and I have no co-sharer or co-parcener therein." On that mortgage Jagannath Singh brought a suit for foreclosure on the 14th February, 1907, against Musammat Kanchan Kunwar, and on the 7th March, 1907, obtained a decree for foreclosure. On the 15th November, 1907, that decree for foreclosure was made absolute. Their Lordships have no hesitation in finding that the deed of gift of the 12th May, 1892, the mortgage of the 12th August, 1892, and the suit for foreclosure of the 14th February, 1907, were all collusive and

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fraudulent, and were intended to make evidence that Musammat Kanchan Kunwar had held the lands in dispute as absolutely her own with as complete a right to dispose of them as a Hindu separated childless man might have to dispose of his self-acquired property. Musammat Kanchan Kunwar, her daughter and her son-in-law must have known perfectly well that she had no right to make the deed of gift or the mortgage.

As their Lordships have already mentioned, the Subordinate Judge in his judgment, which was delivered on the 30th November, 1916, found that Gulab Singh was separate at the time of his death, and the High Court found on appeal that there had been no separation. Gulab Singh had died twenty-eight years before the suit was instituted, and on the question whether the family had been joint or separate in 1886 each Court had to rely mainly on such documentary evidence as had been produced. It appears to their Lordships from the judgment of the Subordinate Judge that he had been much influenced in finding that Gulab Singh was separate when he died from the fact that Bahadur Singh and Niwaz Singh had not given evidence in the suit. He must have forgotten that it had been proved on the 15th March, 1916, by Mohan Singh that his father Bahadur Singh was 79 or 80 years old, and was quite helpless or unable to give evidence, and that his uncle Niwaz Singh was 76 or 77 years old, and that his tongue was paralysed and he was unable to speak or make a statement. The Subordinate Judge was also very much influenced in his finding by the fact that the day-books, also referred to as cash-books, which contained the family accounts had only been produced, and that the ledgers which had been kept by the family had not been produced, and he obviously did not accept as reliable the evidence as to what had become of the ledgers. The explanation of the non-production of the ledgers was given by Mohan Singh, who, when he gave his evidence, was 49 years old and could not have been more than 17 years old when Gulab Singh died. This is how Mohan Singh explained why the ledgers had not been produced :—

"I have not filed the ledgers of all the day-books filed by me inasmuch as they are not with me. I brought them to file them in the Court at Cawnpore. The said ledger was kept in the house of Manmunno Babu and Karan Babu. Manmunno Babu is elder and Karan Babu is younger. I used to keep all my luggage and papers in a room of those very persons, i. e., Manmunno Babu and

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Karan Babu. The house of Manmunno Babu and Karan Babu fell down owing to heavy rain this year in the month of Bhadon and consequently those ledgers got buried under the same house. Those ledgers were kept in two 'bastas.' I did not make a search for them in my house. The ledgers which got buried were kept by me in the room of Manmunno Babu and Karan Babu in 1904. The account-books and the papers which were filed by me in the case instituted in 1904 and taken back from the Court were kept by me in that very house of Manmunno Babu three or four years ago. The papers which were filed by me in the case instituted in 1904 were the same papers as were taken out of the room of Manmunno Babu and filed in this case. I did not file the ledgers in this case because they had become rotten. (Subsequently the witness stated :) When the case was instituted they were not rotten. Now this year in the month of Bhadon and Kunwar when the house fell down on account of heavy rain they were rotten."

That is not an impossible explanation and it may be true. The High Court considered Mohan Singh's explanation as far from satisfactory, but Sir Grimwood Mears, C. J., and Mr. Justice Banerji, who heard the appeal in the High Court, stated in their judgment that "the absence of the ledgers does not, in our opinion, detract from the value of the entries in the cash-books to which we have referred." The learned counsel who argued this appeal on behalf of the appellants commented strongly on the non-production of the ledgers, and contended that if they had been produced they would have shown that the family had separated. What the ledgers would have shown if they had been produced their Lordships do not know, but the entries in the family cash-books which were put in evidence are clear and unambiguous, and point to the only legitimate conclusion that the accounts were the accounts of a joint family.

The main contention of the learned counsel for the appellants was that the entries of the names of the owners in possession of the shares in the villages which were made at the settlement of 1873 should be regarded as conclusive on the question as to whether Gulab Singh, Diwan Singh, Bahadur Singh and Niwaz Singh were joint or separate, and at great length he drew their Lordships' attention to those entries. From those entries it appears that at the settlement of 1873 Gulab Singh was the owner in possession of shares in certain villages, but whether it may be inferred from those entries or from any of them that he was the separate or sole owner of any of the shares is quite another matter. Their Lordships will now give some examples from village khewats of the settlement of 1873 to show how the names of co-sharers were

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entered as the owners of shares. In doing so they will omit particulars which are immaterial. In the settlement khewat of mauza Aurangpur Gahdewa of 1873 the entry is "Name of lambardar, Gulab Singh; names of co-sharers, Gulab Singh, son of Madho Singh, Thakur Gaur, gotra Bharduaj, resident of Baranpur Kanjri, pargana Sheorajpur; Amount of share, 8 annas; Remarks, This is owned by a single man." The entry in the settlement khewat of 1873 of mauza Baranpur Kanjri is "Names of sharers . . . . Gulab Singh, son of Madho Singh, half, and Bahadur Singh, Diwan Singh and Niwaz Singh, sons of Hira Singh in equal shares 1|2," and bracketed opposite that particular entry is "1|3rd . ." The entry in the settlement khewat of 1873 of mauza Baranpur is "Names of co-sharers, Gulab Singh, son of Madho Singh, caste Thakur Gaur, resident of Baranpur Kanjri, 10 pie, 1 fif, 7 kirant, 2 jau, 4 tund, 9 dant, and Bahadur Singh, Diwan Singh and Niwaz Singh, sons of Hira Singh, caste and residence as aforesaid, 5 pies, 4 fifs," and as to the "shamlat" of the mauza the entry is " . . . Gulab Singh, the amount of the ancestral share being 5 pies, 4 fifs, and Diwan Singh, Bahadur Singh and Niwaz Singh, in equal shares, 5 pies, 4 fifs. . . ." The entry in the settlement khewat of 1873 of mauza Sheorajpur is "Names of 'lambardars,' Gulab Singh and Ram Sahai 'lambardar'; Names of co-sharers, Gulab Singh, son of Madho Singh, caste and residence as mentioned above, 11 pies, 8 fifs, 9 kirants, 7 jaus, 2 tunds and 5 dants, Bahadur Singh, Diwan Singh and Niwaz Singh, sons of Hira Singh, caste and residence as aforesaid, in equal shares, 5 pies and 4 fifs. . ." The entry in the settlement khewat of 1873 of mauza Mau is "Name of lambardar, Sheo Charan Lal and Niwaz Singh, lambardars; Names of co-sharers, Niwaz Singh, Bahadur Singh and Diwan Singh, sons of Hira Singh, caste Thakur Gaur, 'gotra' Bharduaj; residents of Baranpur Kanjri, pargana Sheorajpur, in equal shares, 5 annas, 4 pies." Remarks . . . Niwaz Singh lives jointly with his two brothers. No adjustment of account is made. . . ." Their Lordships do not draw from the above entries or from any other similar entries which were made in the revenue settlement of 1873 to which they were referred by the learned counsel any inference that Gulab Singh had separated from his cousins Diwan Singh, Bahadur Singh, and Niwaz Singh, or that there had been any separation in the joint family. But if the learned counsel's prolonged argument on the entries was in any way sound,

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Gulab Singh must have separated from his cousins before the settlement of 1873 was held.

In *Nageshari Bakhsh Singh* v. *Ganesha* (1) in an appeal from Oudh, in which the learned counsel already referred to had argued the case for the appellant then before the Board, it was in that case decided by the Board that a definition of shares in revenue and village papers, by itself, affords a very slight indication of an actual separation in a Hindu family, and is insufficient to prove, contrary to the presumption of law, that the family to which the entries refer had separated. In the judgment delivered in that case by the Board, the Board referred with approval to a judgment of Birdwood, J., of the High Court at Bombay, in *Bhagoji* v. *Bapuji* (2) that "at the hearing the lower Appellate Court should have its attention directed to the ruling in *Fatma* v. *Darya Sahib* (3) in which it was held that the Collector's book is kept for purposes of revenue and not for purposes of title. The fact of a person's name being entered in the Collector's book as occupant of land does not necessarily of itself establish that person's title or defeat the title of any other person." The same observation appears to their Lordships to apply to entries of the names of persons in settlement khewats as the names of co-sharers in a mauza.

Immediately following the quotation in reference to the judgment of Birdwood, J., the Board in the case of *Nageshar Bakhsh Singh* v. *Ganesha* (1) said : "The Board refer in particular to the judgment of Sir John Edge in *Gajendar Singh* v. *Sardar Singh* (4). In their opinion the statements of principle now to be quoted are of significance and are sound as applied not only in Allahabad, but in India as a whole. The main proposition is, of course, widely familiar—namely, that 'given a joint Hindu family, the presumption is, until the contrary is proved, that the family continues joint. That presumption is peculiarly strong in the case of the sons of one father.' The learned Judge further refers to 'experience of the manner in which names of Hindus are entered not uncommonly in revenue and village papers in respect of shares'; and the Board sees no reason to differ from, but approves of, his pronouncement to the following effect : 'A definition of shares in revenue and village papers affords, by itself, but a

1. (1919) L R 47 I A 57 at 70 : 38 M L J 521 (P C).
2. (1888) I L R 13 B 75.
3. (1873) 10 Bom. H C R 187.
4. (1896) I L R 18 A 176, 179 and 180.

very slight indication of an actual separation in a Hindu family, and certainly in no case that has ever come before us could we have regarded such a definition of shares standing alone as sufficient evidence upon which to find, contrary to the presumption in law as to jointure, that the family to which such a definition referred had separated.' "

This Board cannot read Act XIX of 1873, the North-Western Provinces Land-Revenue Act, 1873, which applied to the settlement of 1873, as making the definition of the shares of co-sharers in a settlement khewat conclusive of a separation in a joint Hindu family.

If an actual partition of the joint family property by Madho Singh and Hira Singh, or by Gulab Singh and his cousins Diwan Singh, Bahadur Singh and Niwaz Singh, had been proved, it would be evidence that they had altered their title to it as joint owners and had become separate owners ; but a mere definition of shares in revenue and village papers, unless it was proved that such definition of shares was with a view to a then partition, would not, in their Lordships' opinion, by itself be conclusive evidence even that an actual partition was then intended.

The attention of their Lordships has been drawn to the matters from which the Subordinate Judge and the High Court drew different conclusions on the question whether Gulab Singh had died as separate from his cousins Diwan Singh, Bahadur Singh and Niwaz Singh, and they agree with the High Court and its reasons for finding that there had not been any separation. Those reasons with which their Lordships agree are epitomised by the High Court in the concluding paragraph of the High Court judgment, and are as follows :—

"Upon a consideration of the case as a whole and of the evidence which has been adduced by the parties, we have come to the conclusion that all the *indicia* of a joint Hindu family are present in this case. There was first of all the nucleus of joint ancestral property which belonged to Padam Singh. There is next the presumption of Hindu law that the sons of Padam Singh, who originally must have been joint, continued to be joint so long as they lived, until the contrary was shown. No evidence has been given to prove that they ever separated or that after their death a separation took place between Gulab Singh and the sons of Hira Singh. We have then the facts that property was acquired sometimes in the name of one member and sometimes in the name of another; that debts incurred in the name of one member were discharged by another; that debts were incurred and mortgages were taken in the names of members of both branches jointly ; that a common account was kept relating to the income and expenditure of the family ; that in these accounts the expenses of funerals

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and of religious and other ceremonies connected with different members of the family were jointly entered; that there were common servants who made collections and otherwise served all the members of both branches; that the affairs of the family were looked after by the different members, whether the property stood in the name of any particular member or not; and that there is nothing to prove that an actual separation ever took place. In view of all these circumstances we are unable to hold that the family was a separate family and to agree with the conclusion of the Court below. In our opinion it has been satisfactorily established that the family of the sons of Padam Singh was a joint family at the time of Gulab Singh's death, so that upon the death of Gulab Singh's widow the property in dispute passed to the appellants, the surviving male members of the family."

The appellants in the High Court were the plaintiffs.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellants: *H. S. L. Polak.*

Solicitor for respondents: *Douglas Grant.*

A. de M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

Periamurugappa Asari and another ... *Appellants** (*Defendants* 1 *and* 3)

v.

Manicka Chetty ... *Respondent* (*Plaintiff.*)

Periamurugappa Asari v. Manicka Chetty.

Transfer of Property Act—S. 52—Compromise decree—Applicability of rule of lis pendens *in case of—Compromise tainted by fraud or collusion—Effect—Misdescription of property rendering rule of* lis pendens *inapplicable—What amounts to.*

Pending a suit for a declaration of plaintiff's title to certain property and for recovery of possession of the same from the defendant, the property was sold in execution of a decree against the defendant and was purchased by a third party. The plaintiff and the defendant thereupon entered into an agreement for the purpose of defeating the rights of the auction-purchaser, and, in pursuance of that agreement, a decree was allowed to be passed in favour of the plaintiff.

Held, that the auction-purchase was not affected by the doctrine of *lis pendens,* as the decision in the suit was the result of a collusive agreement entered into between the parties thereto.

Held, further, that there was not such a mis-description of property in the suit as to render the doctrine of *lis pendens* inapplicable.

Second Appeal against the decree of the Court of the Subordinate Judge of Cuddalore in A. S. No. 73 of 1921, pre-

*S A Nos. 1463 and 1754 of 1922. 5th November, 1924.

ferred against the decree of the Court of the District Munsif of Panruti in O. S. No. 27 of 1919.

C. Padmanabha Aiyangar and *T. D. Srinivasa Chariar* for appellants.

K. Bashyam Aiyangar for respondents.

The Court delivered the following

JUDGMENT :—[The earlier portion dealing with a separate appeal being unnecessary for the purpose of this report has been omitted.] There is a further question that arises in the other Second Appeal. O. S. No. 480 of 1913 had previously been filed by the carpenters, that is the present defendants. In that suit they claimed S. No. 32 on the ground that it was carpenter's inam and asked that the defendants in that suit should be directed to give up possession of it. There were four defendants and the 1st defendant Arunachallam Chetty was interested in plots 1 and 2. That suit was filed on 27th August, 1913. In execution of a decree against Arunachallam Chetty, these plots were sold and Thinnappa Chetty purchased them in Court-auction on the 10th September, 1914. Although the interest of Arunachallam Chetty passed to Thinnappa Chetty, the latter was not brought on the record of that suit and a decree was passed against the original defendants including Arunachallam Chetty on 16th November, 1915.

The contention of the appellants is that the alienation in favour of Thinnappa Chetty was made *pendente lite* and his purchase is therefore affected under S. 52 of the Transfer of Property Act by *lis pendens.* Both the District Munsif and the Subordinate Judge have overruled this contention but on different grounds. The District Munsif has held that the doctrine of *lis pendens* has no application, because the decision in the previous suit was the result of a collusive agreement entered into between the parties to that suit. I cannot agree with the view which the Subordinate Judge has taken, to which I shall presently refer. He has not given any finding on the point whether there was collusion. I have therefore examined the evidence myself under S. 103, and O. 41, R. 24, Civil Procedure Code, and I have come to the conclusion that the District Munsif's finding is correct. If it is proved that the carpenters and Arunachallam Chetty, the plaintiffs and the 1st defendant respectively in that suit, entered into an agreement for the purpose of defeating the rights of the auction purchaser, Thinnappa Chetty, and that in pursuance of that agree-

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ment a decree was allowed to be passed in favour of the carpenters—these facts would be sufficient to establish collusion which would render the rule of *lis pendens* inapplicable. The fact that the decree was made in pursuance of a compromise does not exclude the application of S. 52, provided however that such compromise is not tainted by fraud or collusion. *Annamalai Chettiar* v. *Malayandi Appaya Naick* (1). A suit may be collusive even at its very inception or a decree may be obtained by collusion in a suit which was honestly begun. *Krishnappa* v. *Shivappa* (2), *Seth Hukum Chand* v. *Raja Ran Bahadur Singh* (3) and *Tangor Majhi* v. *Jaladhar Deari* (4). In this case I am satisfied that during the progress of the suit which was honestly instituted, the parties entered into a collusive agreement with the express object of defeating the rights of the auction purchaser at the Court sale. In paragraphs 26 and 30 of the Munsif's judgment, he deals with this point fully and I entirely agree with the reasons which he gives for his conclusion. The evidence of P. W. 2 fully supports the view of the District Munsif and he was right in acting upon it. The circumstances and probabilities also show that the decree was the result of a collusion. It is unnecessary to go into this matter more fully.

I have said that the Subordinate Judge also has held on the question of *lis pendens* against the defendants but for different reasons. In his opinion the subject-matter of the previous suit and the present suit is not identical and he has on that ground held that S. 52 has no application. I do not think that this view can be supported. The contest in both the suits related to the same land. It was described as S. No. 32. The carpenters attempted in the previous suit to get possession of what is known as S. No. 32—of its identity there can be no doubt—alleging that it was carpenter's inam. In the present suit again the dispute was about this very plot and the question had to be determined whether it was or was not carpenter's inam. It is doubtless true that in the previous case no plan was filed and no boundaries were given. But it is reasonably certain that the claim was put forward in regard to the plot now in dispute. The *theerva* was given as Rs. 0-13-0 and the extent was given as 0.26. This description applies to the suit land. I do not think that there

1. (1906) I L R 29 M 426 : 16 M L J 372 (F. B.)
2. (1907) I L R 31 B 393 at 398. 3. (1919) 4 Pat L J 580 at 596 and 598.
4. (1909) 14 C W N 322 at 324.

was in the previous suit such misdescription as to render the doctrine of *lis pendens* inapplicable. *Lokenath* v. *Achitananda* (5).

As, however, I have held that Thinnappa Chetty is not bound by *lis pendens* for the reasons given by the Munsif, S. A. No. 1754 of 1922 fails and is dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Avasarala Venkata Rao and others ... *Appellants** (*Defendants Nos.* 7 *to* 9, 14 *to* 16, 31, 17 *to* 20, 22, 24 *to* 26 *and* 28 *to* 30)

v.

Avasarala Manga Rao and others ... *Respondents* (*Plaintiff, Defendants* 1 *to* 5, *L. R.* *of the* 7th *Defendant and Defendants* 10 *to* 12).

Service inam—Karnam service inam—Enfranchisement of—To whose benefit enures—Person in office at the time having obtained decree for possession of inam land—Persons in whose favour inam patta issued—Refusal to issue inam patta to office holder—Effect—Possession recovered in execution by office holder subsequent to enfranchisement—If divests title of holders of inam patta.

Where, on the enfranchisement of a karnam service inam, the Inam Commissioner refused to grant inam patta in the name of the person who then held the office of karnam and who had obtained a decree for the possession of the inam land, and directed the patta to be issued in the names of the persons who were then actually in possession of the land constituting the karnam's inam, *held,* that the enfranchisement must be held to enure not for the benefit of the person who then held the office but for the benefit of the persons in whose names the pattas were made out. The inam patta gives a good title to those persons.

Held further, that the fact that the holder of the office at the time of the enfranchisement subsequently recovered possession in execution of the decree he had previously obtained could not divest the title which had been created by the grant of inam patta in favour of the persons then in possession of the lands.

Second Appeal against the decree of the District Court of Godavari, dated 16th April, 1921 in A. S. Nos. 15 and 25

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*S A No. 522 of 1922. 30th October, 1924.

5. (1909) 15 C L J 591.

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of 1919, preferred against the decree of the Court of the Subordinate Judge of Cocanada in O. S. No. 16 of 1917.

D. Appa Rao and *B. Somayya* for appellants.

G. Lakshmanna and *A. Satyanarayana* for respondents.

The Court delivered the following

JUDGMENT :—Plaintiff and defendants 1 to 31 are the descendants of five brothers. The plaintiff represents one branch, defendants 1 to 6 another branch, defendants 7 to 9 the third branch, defendants 10 to 12 the fourth branch and defendants 13 to 31 the fifth branch. The plaintiff's suit is for partition of his share of the family property. The plaint property was karnam service inam and was enfranchised in 1903 and inam title deeds were issued in 1904.

Defendants 1 to 9 pleaded that 40 acres and odd were not joint family property and the plaintiff could not claim a share of it. Defendants 13 to 31 pleaded that 23 acres and odd were their separate property and the rest of the property, about 40 acres odd, was joint family property and they, as representing the fifth branch, were entitled to one-fifth share.

The Subordinate Judge granted a preliminary decree for partition in favour of the plaintiff for one-fifth of the plaint property. Against that decree defendants 7, 8 and 9 preferred one appeal and defendants 13 to 16, 31, 17 to 22 and 24 to 30 preferred another appeal. The District Judge dismissed both the appeals and affirmed the judgment of the Subordinate Judge. The defendants have preferred this appeal, and evidently defendants 1 to 9 and 13 to 31 have made common cause against the plaintiff.

The first contention urged by Mr. Somayya for the appellant is that the enfranchisement was for the benefit of the karnam and the other members of the family had no interest in the plaint property. At the time of the enfranchisement the karnam's office was held by Venugopal Rao under whom the defendants 13 to 31 claim. The argument of Mr. Somayya is that Venugopal Rao was karnam at the time of the enfranchisement and the enfranchisement must therefore be for his benefit and the inam lands enfranchised became his private property, and he strongly relies upon the recent decision in *Venkata Jagannadha* v. *Veerabhadrayya* (1). What really happened in this case

1. (1921) I L R 44 M 643 : 41 M L J 1 (P. C.)

was: Venugopal Rao was appointed karnam in the place of his father. He brought a suit, S. S. No. 47 of 1902, for recovery of the inam property attached to the office of karnam against the relations and a decree was passed in his favour for possession of 3 puttis and 19 tooms, *vide* Ex. 1. This decree was affirmed on appeal by the Collector of Godavari District on 14th January, 1904, *vide* Ex. 1. Before the appeal was disposed of proceedings for the enfranchisement of the karnam's inam were started and the Inam Deputy Collector passed proceedings on 2nd August, 1903 and directed that inam title deed should be issued in the names of the persons who were actually in possession of the land constituting the karnam's inam. *Vide* Ex. 11. Venugopal who was given a decree for possession of 3 puttis and 19 tooms was unable to get possession of what was decreed to him by reason of the issue of an injunction in a suit by some of the defendants against the delivery of the property to him. The Inam Deputy Collector in his proceedings did not order patta in the name of Venugopal Rao. He ordered patta to be issued only in the names of persons then in actual occupation of the inam lands. His father Kama Razu was in possession of some of the inam lands and his name was included in the inam patta. If the enfranchisement was for the benefit of the karnam then in office, no doubt Venugopal Rao would have been entitled to the whole of the enfranchised land. But the Inam Deputy Collector for reasons which are not quite clear directed patta to be issued only in the names of persons in actual occupation, and he even included the name of one Ammanchi Lakshmamma, the widow of one of the members of the family on the ground that she had an interest in the inam property. In *Venkata Jagannadha* v. *Veerabhadrayya* (1) it was decided that when land is enfranchised and patta is issued in the name of a karnam, the enfranchised inam land becomes his private property and the members of his family have no right to it. The decision, therefore, has no application to the facts of the present case. If the enfranchisement was in the name of Venugopal Rao the other members of the family could not claim a share of the property. The enfranchisement is not in his name, but in the names of the other members of the family. The contention that the enfranchisement was to enure for the benefit of the karnam in office at the time of

1. (1921) I L R 44 M 643 : 41 M L J 1 (P C).

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the enfranchisement receives no support from the decision in *Venkata Jagannadha* v. *Veerabhadrayya* (1). On the other hand, their Lordships lay considerable emphasis on the fact that the inam patta should not be treated as a mere formality but should be treated as giving title to the property to the person in whose name the inam patta is granted. They observe at page 655 : "When accordingly on the 21st March, 1906, the title-deed already quoted was granted by way of an inam to the appellant's father and was in express words confirmed to him, his representatives and assigns, to hold or dispose of as he or they think proper, the Board is of opinion that that enfranchisement must be given full effect to, and that it is not subject to be eviscerated or altered by the claim for partition or division put forward in the present suit." This decision overrules the decision in *Gunnaiyan* v. *Kamakshi Aiyar* (2) and the cases which follow that case. Their Lordships approve of the Full Bench decision in *Venkata* v. *Rama* (3) in which it was held that the enfranchisement of the service inam in favour of the holder of the office for the time being, though he had no hereditary title to the office, enured for his benefit and his title was not liable to be defeated at the suit of the hereditary office-holder who was able to evict him from the office. The principle of the decision is that the land which is given to a village officer is Government land and the village officer is only entitled to the emoluments or income from the land so long as he holds the office. Whether the office be hereditary or not, the service inam land is only attached to the office and if the office happens to be held by any person, whether with or without hereditary right to it, the enfranchisement in his favour confers an absolute title on him. His relations who on his demise or on his dismissal would succeed to the office could not claim the enfranchised land as belonging to the family of which the karnam is a member. It follows, therefore, that the Government has an undoubted right to enfranchise the inam in favour of any person, and no one has a right to question it. No doubt according to inam rules the enfranchisement is made in favour of the person holding the office. But that would not give a right to the other members of the family to a share in the land so enfran-

1. (1921) I L R 44 M 643 : 41 M L J 1 (P C).

2. (1902) I L R 26 M 339. 3. (1884) I L R 8 M 249 at 262 (F B).

chised in favour of the holder of the office. *Vide* decision in *Venkatarayudu* v. *Venkataramayya* (4).

In this case rightly or wrongly the Inam Commissioner declined to issue inam patta in the name of Venugopal Rao who was the holder of the office of karnam at the time of the enfranchisement proceedings and though he was aware of the fact that Venugopal Rao had obtained a decree for possession of the inam land, yet he declined to make out a patta in his name unless he executed the decree within two months. The two months having expired and the decree not having been executed, the Deputy Collector proceeded to order pattas according to possession. The inam pattas therefore conferred title on the persons in whose names the pattas were issued. In *Tariya Gowdu* v. *Vonamo Gowdu* (5) pattas were issued in the name of the members of the family of hereditary office-holders although only one of them was the actual office-holder. It was held that such a grant was not illegal. The learned Judges observe at page 206: "We cannot find any legal foundation for the view which appears to be held by the two lower Courts that if on enfranchisement the Government grants a portion of the inam lands to a man who, although a member of the family of hereditary office-holders, was not himself actually in office at the time of enfranchisement, such a grant is illegal and must be set aside by a Civil Court." This case is against the contention of the appellants that the grant enured for the benefit of Venugopal Rao. In *Dharanipragada Durgamma* v. *Kadambari Virrazu* (6) the lands constituting the emoluments of the office of the karnam were enfranchised in favour of a widow who had been in possession since the death of her deceased husband which took place about 18 years previously. They were subsequently sold by her. The Court held that the reversioners could not dispute the alienation. With regard to the Full Bench ruling in *Venkata* v. *Rama* (3) the learned Judges observe : "That decision proceeded on the broad ground that the plaintiff did not hold the office of karnam at the time of the enfranchisement and, therefore, had no title to sue for the lands and that the land when enfranchised was at the disposal of Government and alienable to whomsoever the Government pleased." In this case as I have already observed the Inam Commissioner rightly or

3. (1884) I L R 8 M 249 (F B). 4. (1891) I L R 15 M 284.
5. (1898) I L R 22 M 204.
6. (1897) I L R 21 M 47 : 7 M L J 233.

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wrongly refused to grant inam patta in the name of Venugopal Rao who was the karnam in office and who had obtained a decree for the possession of the inam land and it must therefore be taken that the enfranchisement in the names of the persons mentioned in Ex. 11 enured not for the benefit of the karnam but for the benefit of the persons in whose names the pattas were made out. That the inam patta gives a good title is clear from a recent decision of a Bench of this Court in *Krishna Sastri* v. *Singaravelu Mudaliar* (7). In that case Sir William Ayling, J. observes as follows: "I think the judgment of the Privy Council(*Venkata Jagannadha* v. *Veerabhadrayya* (1)] amounts to stating that the grant of a title deed at enfranchisement of a service inam (unlike the case of a personal inam) does confer a new title ; and that, for this reason, it cannot be questioned by other members of his family." This decision was followed in a recent case by Wallace, J., in *Gourikantam* v. *Ramamurthi* (8). He observes at page 490 : " Since, however, I hold it is clear on the authority of *Venkata Jagannadha* v. *Veerabhadrayya* (1) that enfranchisement is a clear and unequivocal resumption by the Government of the land and a re-grant to whomsoever it pleases, it follows that, unless the Government had at the time of the resumption no right to resume, the 1st defendant has no case." It is unnecessary to decide in this case whether there was an actual resumption by the Government of the service inam or not. It is sufficient for the purpose of this case to hold that the Government enfranchised the inam land which it had absolute power to dispose of, in favour of the persons in whose names pattas were issued by the Inam Commissioner. The first contention, therefore, that the enfranchisement in 1903 was for the benefit of Venugopal Rao, the karnam then in office, is not sustainable.

The second contention is that the decree in S. A. S. No. 47 of 1902 was for the whole of the karnam's inam which measured about 63 acres and owing to some miscalculation only 23 acres were delivered to the plaintiff Venugopal Rao. It is argued that the whole of the land having been decreed to Venugopal Rao, the others had no right to the land and therefore it must be taken that Venugopal Rao was in possession of the whole of the land and the enfranchisement proceedings

1. (1921) I L R 44 M 643 : 41 M L J 1 (P C).
7. (1924) 48 M L J 470 8. (1924) 46 M L J 482.

were for his benefit. It is unnecessary to consider this point in detail in view of my decision on the third point. Venkata Rao v. Manga Rao.

The next point urged by Mr. Somayya is that the defendants 13 to 31 are entitled to 23 acres. This contention is based on the fact that subsequent to the inam proceedings the decree in S. A. S. No. 47 of 1902 was executed by Venugopal Rao and he got actual possession of 23 acres. He no doubt got possession of 23 acres by virtue of his being the karnam in office. But unfortunately for him the enfranchisement proceedings were over before he got possession, and the inam pattas had been issued or ordered to be issued. According to the proceedings of the Inam Deputy Collector, Ex. 11, persons who were actually then in possession were granted pattas. And he says : " Venugopal Rao, decree-holder in the Summary Suit referred to above, admits that he has himself no possession, but he says that the Virayala people do not hold a half share in it, but he has not proved it and besides he has nothing to do with the land not being one in possession." The argument for the appellant is that 23 acres odd had become the property of Venugopal Rao, and that the enfranchisement proceedings could not take away that right and he relies upon the decision in *Lakshminarasimham* v. *Venktaratnayamma* (9). In that case Spencer and Ramesam, JJ. held " the fact that the Government enfranchised a karnam service inam and issued title deed in the name of a person did not of itself confer a title on such person and the inam title deeds could create no title where no title existed before." Mr. Justice Spencer observes at page 335 : " On this point I am of opinion that the language of their Lordships should not be strained too far so as to make it apply to circumstances which were not before them. To say that inam title deeds created a title where no title existed before would be to disregard the provisions of Madras Act VIII of 1869 which expressly state that 'nothing contained in any title deed shall be deemed to define, limit, infringe or destroy the rights of any description of holders or occupiers of the lands from which any inam is derived' or 'affect the interests of any person other than the inam holder named in the title deed' and' nothing contained in Madras Act IV of 1862 or in Madras Act IV of 1866 shall be deemed to confer on any inam holder any right to land which he would not otherwise possess." Mr. Justice Ramesam observes at page 336 :

9. (1921) 30 M L T 334.

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"The judgment of their Lordships of the Privy Council in *Venkata Jagannadha* v. *Veerabhadrayya* (1) cannot be used as an authority for the proposition that the inam title deed is conclusive as to the persons in whose favour enfranchisement is to operate." If this decision is good law no doubt the appellant's contention could prevail. But Mr. Justice Ayling and Mr. Justice Odgers have dissented from the view of Mr. Justice Spencer and Mr. Justice Ramesam in the case already referred to, *Krishna Sastri* v. *Singaravelu Mudaliar* (7) and Mr. Justice Wallace also dissents from this view in *Gourikantam* v. *Ramamurthi* (8). The view of Spencer and Ramesam, JJ. is opposed to the decision in *Sankara Subbayyar* v. *Ramaswami Aiyangar* (10) wherein the facts were: Inam lands constituting the emoluments of the office of Nattamgar were enfranchised in favour of the plaintiff and defendant separately. In November, 1890, the defendant was informed that a patta for half of the lands would be issued in his name, and it was so issued on the following May. In April, 1891 (after the resolution to enfranchise the land was come to) the plaintiff was appointed to be the sole Nattamgar and he sued in 1894 for the cancellation of the enfranchisement patta issued to the defendant, and for the issue of a patta in his own name in respect of the lands comprised therein and for possession of the lands. The Court held that the plaintiff was not entitled to the relief sought. The learned Judges observe at p. 456: "We think that the enfranchisement of half of the land in second defendant's name was in accordance with the principle accepted in the Full Bench case *Venkata* v. *Rama* (3) referred to by the District Judge, inasmuch as the right of the second defendant, established by the suit under Regulation VI of 1831, was never subsequently set aside or even disowned by the revenue authorities. The appointment of the plaintiff as sole Nattamgar in April, 1891, was never intended to affect the right of the second defendant to the moiety of the lands. It was merely an act of policy on the part of the Government for the more convenient discharge of the duties of the office and could only affect the right of the second defendant from the date of such appointment. We do not think it would be reasonable, nor is there any authority for holding that the plaintiff's appointment in April, 1891, should have effect re-

1. (1921) I L R 44 M 643 : 41 M L J 1 (P C).
3. (1884) I L R 8 M 249 (F B). 7. (1924) 48 M L J 470.
8. (1924 46 M L J 482. 10. (1897) I L R 20 M 454.

trospectively so as to divest the second defendant of the right which had vested in him by the prior order to enfranchise half the lands in his name." The order for enfranchisement was passed before Venugopal Rao got possession of the lands. His subsequent possession cannot divest the title which was created by the grant of inam patta in favour of the persons then in possession of the lands. If the subsequent appointment of the plaintiff in *Sankara Subbayyar* v. *Ramaswami Aiyangar* (10) could not divest the title of the second defendant in that suit which had vested in him, it is difficult to see how the getting possession of the land in execution of the decree in the summary suit could divest a title which had been conferred by the grant of the inam patta. In this view Venugopal Rao and his descendants could not claim exclusive title to the 23 acres in their possession. They do not attempt to set up adverse possession for more than 60 years against the Government and granting that they could get prescriptive title against the plaintiff they have not proved that they were in possession for more than 12 years before the date of suit. As a matter of fact their possession was only subsequent to 1905 and the suit was filed in 1917.

In the result the second appeal fails and is dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE VENKATASUBBA RAO.

Echikan Charakare Kelu Nair ... *Appellant** (*Plaintiff*)

v.

The Secretary of State for India in Council represented by the Collector of South Canara, Mangalore ... *Respondent* (*Defendant*).

Charakare Kelu Nair v. Secretary of State for India in Council.

Madras Revenue Recovery Act, S. 58—Scope and effect of —Assessment —Rate of—Alteration by Government—Legality—Jurisdiction of Civil Courts to decide—Binding engagement by Government fixing rate for a certain period —What amounts to—Effect—S. 59—Suit under—Limitation—Period of notice—Deduction of—Plaintiff's right to.

S. 58 of the Madras Revenue Recovery Act precludes the Civil Courts from considering the question, what is the proper rate of assessment payable to Government in respect of land held under it. It is, however, no bar to

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*S A No. 1586 of 1922. 21st January, 1925.

10. (1897) I L R 20 M 454.

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their considering the question whether Government, having entered into a binding engagement by which the assessment is fixed at a certain rate for a certain period, can alter the rate during that period.

In a suit by the plaintiff for a declaration that the assessment imposed by the Government on the suit kumris at the rate of eight annas per acre was illegal and that the Government could levy the tax only at two annas fixed at the time of the Settlement, *held,* that the notification published by the Government in the District Gazette on 6th November, 1902, of the introduction of a new Settlement in South Canara supplemented by the G. O., dated 17th April, 1903, as understood in the light of declarations of Government Policy, amounted to a grant of rights on the ryotwari holders in the District of South Canara for a period of thirty years, that there was thus a binding engagement by which the assessment was fixed at a certain rate for that period, that the Government could not alter the rate during that period, and that S. 58 of the Revenue Recovery Act was no bar to the Civil Court's considering the question whether an alteration purporting to be made by the Government of the rate during that period was legal.

In computing the period of limitation for a suit brought under S. 59 of the Madras Revenue Recovery Act, the plaintiff is entitled to a deduction of the two months' period occupied by the notice legally necessary to be issued before instituting the suit.

Appeal against the decree of the Court of the Subordinate Judge of South Canara in A. S. No. 215 of 1921 (A. S. No. 159 of 1921 on the file of the District Court) preferred against the decree of the Court of the Additional District Munsif of Kasargod in O. S. No. 204 of 1920 (O. S. No. 927 of 1919 on the file of the Court of the Principal District Munsif of Kasargod).

C. V. Ananthakrishna Aiyar for appellant.

The Advocate-General for respondent.

The Court delivered the following

Ramesam, J.

JUDGMENTS :—*Ramesam, J.* :—The facts of this second appeal are stated by my learned brother whose judgment I had the advantage of perusing.

If the question before us is—what is the proper rate of assessment on the suit land ?—we are precluded from entering upon its consideration by S. 58 of the Revenue Recovery Act. The Civil Courts have no jurisdiction to do the work of the Settlement Department, whether that department has come to a correct or incorrect conclusion in respect of a particular plot of land. In my opinion this is the proper scope of S. 58. But when the question before us is—whether Government, having entered into a binding engagement, by which the assessment is fixed at a certain rate for a certain period, can

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alter the rate during that period—to say that that S. 58 is a bar to our consideration of the question is to say that the section enables the Government to avoid the binding nature of contracts relating to revenue. I do not think the words 'any question as to the rate of land revenue payable to Government' were intended to support such a contention.

This leads me to the question—whether there is any binding engagement on the part of the Government. On this point I see no reason to differ from my learned brother's conclusion, viz., that the notification of the Government, dated 6th November, 1902, supplemented by the Government Order, dated 17th April, 1903, as understood in the light of declarations of Government Policy, amount to a grant of rights on the ryotwari holders in the District of South Canara for a period of thirty years. Though there are facts in *Secretary of State for India in Council* v. *Ramanujachariar* (1) which distinguish that case from the present, it supports our conclusion to this extent.

On the question of limitation it is true that I have always felt some difficulty in following the reasoning in *Srinivasa Aiyangar* v. *The Secretary of State* (2). After the recent amendment of the Limitation Act, the matter is not of practical importance. I am therefore content to follow that decision. I agree with the order proposed by my learned brother.

Venkatasubba Rao, J.

Venkatasubba Rao, J. :—The question of law that has been raised in this second appeal is, can Government revise and enhance the land tax during the currency of the 30-year period of the settlement contrary to the notification introducing such settlement ?

The facts of the case may be shortly set forth. The plaintiff sues for a declaration that the assessment imposed by the Government on the suit kumris at the rate of eight annas per acre was illegal and that the Government could levy the tax only at two annas fixed at the time of the settlement. The kumris in question were 165 odd acres in extent and the plaintiff claims the recovery of Rs. 493-3-0 being the amount collected in excess of what was actually due. The lands are situate in Kasargod Taluq of the South Canara District and the Government published on the 6th November, 1902 in the District Gazette a notification of the introduction of a new settle-

1. (1924) 47 M L J 780. 2. (1912) I L R 38 M 92 : 24 M L J 41.

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ment. The notification begins with the statement that the Government had sanctioned the scheme for the revision of the land assessment of the South Canara District and proceeds to say that the new rates will take effect from Fasli 1312 corresponding to July, 1902. Then follows the definition and classification of lands and sanctioned rates are set forth along with the data for the calculation. Paragraph 20 is material.

'The settlement will be for a period of thirty years, during which period no extra charge will be made on "dry" converted into "wet" or "garden" or on "wet" converted into "garden" or on "single" crop wet land converted into "double" crop wet. Unoccupied land will be assessed according to the existing classification when cultivated or brought under occupation. At the end of the settlement period the Government reserve the right to introduce such changes in the classification and assessment of "wet", "dry" and "garden" lands as may then seem proper.'

Kumri lands were by the notification excepted from the settlement and regarding them it was said that separate orders would be issued later. *See* paragraph 13.

Accordingly a Government order, dated the 17th of April, 1903, was issued approving of a notification fixing a rate of two annas per acre in respect of suit lands. This Government order is recited in the proceedings of the Board of Revenue, dated 27th April, 1903. A patta was issued to the plaintiff (appellant) in respect of certain lands and the kumris in question were then treated as Government kumris and omitted from the patta granted to him. On the 27th of May, 1906, he presented a petition to the Collector of South Canara asking that the said land might be included in his patta but an order was made to the effect that his claim would be disposed of under the Dharkast rules. Thereupon, the plaintiff filed two suits against the Secretary of State for India, O. S. No. 352 of 1911 and O. S. No. 3 of 1913 in the District Munsif's Court of Kasargod asking for a declaration that he was the owner of the kumris in question and that he was entitled to get a patta for them and these suits were ultimately disposed of in his favour. In respect of a portion of these lands, he got a declaration from the District Court of South Canara in the following terms :—

"There will be a declaration that the plaintiff is the absolute owner and proprietor of the marginally noted plots

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falling within the plaint boundaries, and that as such he is entitled to get a patta for the same subject to the payment of the Sovereign's share of the produce as assessment and there will be a permanent injunction restraining the defendant from interfering with his lawful possession and enjoyment of these properties."

In respect of the remainder of the lands he got a similar declaration from the High Court. After the plaintiff was thus declared to be the absolute owner of the kumris, the Government issued to him a patta charging an enhanced rate of assessment, namely, eight annas per acre, although the rate fixed in the notification was two annas per acre. The plaintiff first sought redress from the Collector of South Canara (*see* Ex. K), then from the Board of Revenue (*see* Ex. M) and then from the Government but met with no success. Thereupon, the present suit was filed. The Government's defence was twofold: first, they denied that the plaintiff was the owner of the kumris in question; secondly, they pleaded that Civil Courts had no jurisdiction to decide questions relating to rates of assessment and relied on S. 58 of the Madras Revenue Recovery Act II of 1864. They generally controverted the position that the Government had no right to vary the rates of assessment during the currency of the settlement period. The first defence in view of the result of the litigation that preceded the suit is obviously frivolous and was summarily rejected both by the District Munsif and the Subordinate Judge. In regard to the second plea, it must be said that the authority on the point is scanty and the question must be determined mainly with reference to general principles. It is now established that the proprietorship of the ryotwari holder in his holding is subject to the prerogative which the Crown has, according to the common law of India of imposing by an executive act, assessment on land and varying it from time to time. The right of the Government to assess land to land revenue and to vary it is not a right created or conferred by any statute but, as stated above, the Crown possesses the prerogative of exacting from a subject holding arable land, its share of the produce or the equivalent of such produce. See observations of Bhashyam Aiyangar, J., in *Bell* v. *The Municipal Commissioners for the City of Madras* (3) and *Madathapu Ramaya* v. *The Secretary of State for India* (4) and of

3. (1902) I L R 25 M 457 at 482 : 12 M L J 208.
4. (1903) I L R 27 M 386 at 396 : 14 M L J 57.

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Subramania Aiyar, J. in *Madathapu Ramaya* v. *The Secretary of State for India* (5).

In the actual exercise of the prerogative of the Crown above referred to, the Crown is not supposed to proceed without any regard to definite and well-established principles such as that the Crown is not entitled to more than a fixed share of the produce. *See* Subramania Aiyar, J. in *Madathapu Ramaya* v. *The Secretary of State for India* (6). The learned Judge also refers to another well-established principle, namely, that the usual settlement period is thirty years [see *Madathapu Ramaya* v. *The Secretary of State for India* (6).] This feature of ryotwari settlement is referred to over and over again in the judgments of the Judicial Committee and of the High Court and in works of authority.

In *Sankaravadivelu Pillai* v. *The Secretary of State for India in Council* (7), Subramania Aiyar, J. refers to this incident.

In *Maclean's Manual* of the Administration of the Madras Presidency, Vol. 1, the following passage occurs at page 110:—

"The term of the Madras ryotwari settlement is according to the present intentions of Government 30 years from the date of completion of each particular local settlement at the end of which time not only the commutation money rates but the grain values themselves now assigned to the land are liable to revision."

Again at page 121 :—

"The most important item in the yearly demand, namely the normal land tax, is fixed in advance and is liable to revision according to present arrangements only once in every thirty years from the time of first settlement."

Baden-Powell in Vol. III of his Land Tenures at page 75 says :—

"The duration of settlement is thirty years. During that period neither the grain values nor the commutation prices are altered."

The Board's Standing Order on the subject runs thus :—

"At each settlement or re-settlement of a district, Government will fix at their discretion the period for which such settlement or re-settlement shall be in force. The Collector shall then notify the period in the District Gazette and

5. (1903) I L R 27 M 386 at 388 : 14 M L J 37.

6. (1903) I L R 27 M 386 at 389 : 14 M L J 37.

7. (1904) I L R 28 M 72 at 80 : 15 M L J 32.

explain to the ryots that the new rates will not be liable to alteration during the currency of the settlement period."

Referring to ryotwari settlements, their Lordships of the Judicial Committee observe in *Bala Surya Prasad Rao* v. *The Secretary of State for India* (8):

"It has, however, long been the practice on Government estates to make periodical settlements with the ryots whereby the Government's share in the produce is commuted for a fixed annual payment in assessing which the wet lands are separately classified. The annual payment is incapable of increase during the period for which the settlement is made."

I have shown that the notification in question contains a definite undertaking that the rate fixed will not be varied during the thirty-year period of the settlement. From the Standing Order referred to above, it is clear that not only was this notification published in the District Gazette but that its clauses were explained by the Collector to the ryots in the taluq.

The reason for imposing a higher rate appears extremely curious. The Government have discreetly refrained from referring to it in their statement. The plaintiff has discovered that a notification, dated 26th January, 1913, was published in the District Gazette over the signature of the Revenue Divisional Officer, to the effect that the kumri areas to which claims may be established in Courts of Law may be assessed at the full dry rates instead of kumri rates. The action is thus intended to penalise persons who challenge in Courts of Law the Government's decision in regard to the ownership of the land. The Government having wrongfully denied the plaintiff's title seek to take advantage of their own wrong to render nugatory the decision of the Court by imposing an arbitrary rate and thus treating the land contrary to the finding, as land belonging to them and at their absolute disposal. That the act of the Government in going back upon their promise is impolitic, oppressive and indefensible can scarcely be denied. It is opposed to repeated declarations of the Government and accepted notions of established usage. The act constitutes a clear breach of faith. The question, however, remains is the claim of the Government not merely unjust but also illegal and can Courts of Law deal with the question and protect the

8. (1917) I L R 40 M 886 : 33 M L J 144 (P C).

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aggrieved party? In *Kandukuri Bala Surya Rao* v. *Secretary of State for India* (8), the case referred to above, their Lordships of the Judicial Committee held that the Government could not impose upon a Zemindar a cess for the use of water, the right to use which was appurtenant to the land in respect of which the jamma was payable, without increasing the amount of the jamma and thus committing a breach of the obligation undertaken at the time of the permanent settlement. The Irrigation Cess Act conferred on the Government a right to levy a water cess and purporting to act under this Act, the Government levied the cess in question. Independent of and apart from the Act, the Government did not claim any such right, but the Government contended that the settlement with the Zemindar did not amount to an engagement within the meaning of the Act and in the absence of it they could exercise the right conferred by the statute. The question in the present case is, is there any such engagement between the Government on the one hand and the ryotwari holders on the other. If there is, the Government's action is illegal for they do not rely upon any statute in their favour. The observations of their Lordships in this case referring to ryotwari tenure were in a sense *obiter*, but they are entitled to great weight as an argument based on them was used to support the conclusion at which they arrived with reference to the position of the Zemindar which was then directly under consideration.

This case was treated by a Bench of this Court as an authority for the position that the assessment is incapable of increase in regard to ryotwari tenures during the period for which the settlement is made. *Secretary of State for India* v. *Ramanujachariar* (1). Incidentally, I may mention that this is the only direct ruling on the point.

On a construction of the notification I am clearly of the opinion that it amounts to a grant in favour of the ryotwari holders of the taluq. The State was possessed of the right. I shall assume of levying any assessment it pleased. By the notification it gives up the right to levy any tax over and above that fixed at the settlement. Its right was indefinite. It was at liberty to fix a high or a low rate. By the notification the right which was indefinite was made definite and whatever right it possessed to fix a rate in excess of what was actually

1. (1924) 47 M L J 780.
8. (1917) I L R 40 M 886 : 33 M L J 144 (P C).

fixed, it released in favour of the ryotwari holders. In other words, assuming that the Government had a right to a share of the produce above what was fixed at the settlement, that right was by the notification granted by virtue of the settlement to the holders of the lands. The act of the Government might be described as a release, grant or an engagement, but by whatever word it may be described, the clear effect is that the Government irrevocably undertook not to enhance the assessment during the currency of the settlement.

I have not the slightest doubt that their Lordships of the Judicial Committee in *Kandukuri Bala Surya Rao* v. *Secretary of State for India* (8) understood the position in this sense when they observed, dealing with the ryotwari holders, that the annual payment was incapable of increase during the period for which the settlement was made.

There thus being a grant or release in favour of ryotwari holders, S. 58 of the Revenue Recovery Act cannot oust the jurisdiction of the Civil Courts. S. 58 runs thus :—

> "No Court of Civil Judicature shall have authority to take into consideration or decide any question as to the rate of land revenue payable to Government or as to the amount of assessment fixed or to be hereafter fixed on the portions of a divided estate."

The Courts are prohibited from deciding any question as to the rate of revenue or as to the amount of assessment. But they have full jurisdiction to decide whether or not the land or person is at all under liability to be assessed to land revenue. See *Madathapu Ramaya* v. *The Secretary of State for India* (9). Similarly if there is a binding engagement or a grant or a release, the section does not deprive the Civil Courts of their undoubted jurisdiction to give effect to and enforce its terms. S. 58, therefore, is not a bar to the action. As Subramania Aiyar, J. points in *Madathapu Ramaya* v. *The Secretary of State for India* (6), although the prerogative of the Crown is to be exercised in accordance with definite and well-established principles, S. 58 has been enacted in order to save the Crown from litigation to which but for such a provision, it would be exposed, that is to say, the Crown cannot be compelled by Courts of Law to act in accordance with those principles however well settled they may be. The

6. (1903) I L R 27 M 386 at 389 : 14 M L J 37.
8. (1917) I L R 40 M 886 : 33 M L J 144 (P C).
9. (1903) I L R 27 M 386 at 391 and 396 : 14 M L J 37.

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question assumes an entirely different aspect when the matter passes out of the region of ethics and State policy into the domain of law. When the obligations of the State have taken the form of an arrangement which Courts can recognise, the bar of S. 58 ceases to have operation. In my opinion, therefore, the plaintiff is entitled to the declaration that the defendant cannot collect more than two annas per acre in respect of the kumris which are the subject of this suit.

There remains only the question of the recovery of the amounts actually paid. The appellant's learned vakil concedes that the payments made in 1918 are barred by limitation.

In regard to payments of 1919, it is sufficient to say that I am willing to follow *Srinivasa Aiyangar* v. *The Secretary of State for India* (2), where it was held that the period of two months (the period of notice) should be deducted in computing limitation. If this period is deducted all the payments of 1919 are in time and the plaintiff will be entitled to a decree to that extent. In the result the decree of the Lower Appellate Court is set aside and the plaintiff's suit is decreed with full costs here and in the Courts below to the extent indicated above.

A. S. V. *Appellate decree set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Rasappa Pillai .... *Appellant** (*Plaintiff*)

v.

Mitta Zemindar Doraiswami Reddiar *alias* Pethu Reddiar and others ... *Respondents* (*Defendants* 1 *to* 6).

Rasappa Pillai v. Doraiswami Reddiar.

Contract Act, S. 69—Sale to A free from encumbrances—Subsequent sale to B subject to encumbrances—Failure of B to discharge encumbrance and attachment and sale of property purchased by A in consequence—Payment by A to avert sale—Suit by him to recover amount paid from B—Maintainability—Bound by law to pay—Meaning.

The 3rd defendant first sold certain properties to the plaintiff, and then sold certain other properties to the 1st defendant. The sale to the plaintiff

*S A No. 276 of 1922. 12th February, 1925.

2. (1913) I.L R 38 M 92 : 24 M L J 41.

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was said to be free from encumbrances, whereas the sale to the 1st defendant recited various encumbrances on the property which the 1st defendant was to discharge as a part of the sale price. In particular, he had to pay off a decree debt of Rs 2,000 obtained by one R. Admittedly, the 1st defendant did not pay off that amount and subsequently the plaintiff's properties which, together with those sold to the 1st defendant had been attached by R before judgment, were sold. In order to prevent the sale being confirmed, the plaintiff paid the decree amount and sued to recover that sum from defendants 1 to 3 and their families, the 2nd defendant being an alienee from the 1st defendant.

Held that S. 69 of the Contract Act applied to the case and that under it the plaintiff was entitled to recover the money he had paid.

Meaning of the words "bound by law to pay" in S. 69.

Second Appeal against the decree of the District Court of Salem in A. S. No. 186 of 1920 preferred against the decree of the Court of the District Munsif of Namakkal in O. S. No. 440 of 1917.

A. Krishnaswami Aiyar and *V. N. Venkatavaradachariar* for appellant.

L. S. Veeraraghava Aiyar for respondents.

The Court delivered the following

JUDGMENT :—I think it is necessary in this case to set out the facts, for although the District Judge says in his judgment that the facts of this case are not in dispute, he has come to one conclusion of fact which has been questioned here. In 1905, the 3rd defendant sold certain properties to the plaintiff for Rs. 2,800 and in 1909 he sold certain other properties to the 1st defendant for Rs. 16,150. The sale to plaintiff was said to be free from encumbrances, whereas the sale to the 1st defendant recited various encumbrances on the property, which the 1st defendant was to discharge as a part of the sale price. In particular, he had to pay off a decree debt of Rs. 2,000 obtained by one Rangaswami. Admittedly, the 1st defendant did not pay off this amount and subsequently the plaintiff's properties which, together with those sold to the 1st defendant had been attached by Rangaswami before judgment, were sold. In order to prevent the sale being confirmed, the plaintiff paid the decree amount and now sues to recover that sum from defendants 1 to 3 and their families, the 2nd defendant being an alienee from the 1st defendant. The District Judge has found that neither S. 69 nor S. 70 of the Indian Contract Act supports the plaintiff, for he finds "the 1st defendant was under no legal obligation to clear the plaintiff's property from the attachment ; nor can I find that he

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was under any contractual obligation which could have been enforced by law. Nor can I find he was under any legal obligation to contribute to reimburse the plaintiff." This finding appears to be based to a considerable extent on the finding of fact to which I have alluded above and which is now in dispute. Under his sale deed, the 1st defendant undertook to pay Rangaswami's decree debt. But he did not do so although it appears that he did pay full consideration for the sale deed in that he paid a debt not specified in that deed and paid certain amounts to other creditors in excess of the stipulated sums. In respect of this the learned Judge states: "It also appears that the 1st defendant had his vendor's consent to the course he adopted," and then adds: "The 1st defendant and his vendor might have entered into a new contract the next day after Ex. I and in fact did enter into a new contract when his vendor agreed to the 1st defendant being excused from paying up Rangaswami's debt." This amounts to a finding that there was novation of the contract of sale. Such a case is not set up either by the 1st defendant or by the 3rd defendant, and no issue has been framed on the point and it has not been considered in the trial Court. It further appears that this finding is directly opposed to an admission in the 1st defendant's evidence, for there he deposes "There is no particular reason why I should have paid off those advances and not Rangaswami's except that the others were more pressing and were mortgage decrees." He does not rely on the novation of contract found by the District Judge, but simply says that he made these payments because some creditors were pressing harder than others. This finding, therefore, cannot be accepted and we must take it that the contract between the 3rd defendant and the 1st defendant is in accordance with the terms of Ex. I. That being so it remains to consider whether the plaintiff comes within the provisions of S. 69 of the Contract Act, or in this appeal it is not suggested that S. 70 is applicable. S. 69 runs as follows :—

"A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other."

It cannot be disputed that plaintiff was interested in the payment of this money, inasmuch as it was the only means of saving the property which he had purchased from the 3rd defendant.

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Then, the question arises, whether the 1st defendant was bound by law to pay that money, namely, Rangaswami's decree debt. Under Ex. I he had contracted with the 3rd defendant to pay that amount and so far as the 3rd defendant is concerned, he could have compelled the payment of the sum by the 1st defendant. These facts are very much the same as in the case reported in *Muthurakku Maniagaran* v. *Rakkappa* (1), the only difference being that the money in that case was due under a mortgage. Both the learned Judges in that case based their decision on S. 69 of the Contract Act and one of them added that S. 70 was also applicable. This authority seems to me quite clear, but in a subsequent case reported in *Kunjithapatham Pillai* v. *Palamalai Pillai* (2), some little doubt seems to have been expressed as to the correctness of *Muthurakku Maniagaran* v. *Rakkappa* (1), although there was no express dissent, the observation relied on by the respondent being one made *obiter*. In considering the meaning of the words " bound by law to pay " the learned Judges say : " What is intended is a contractual obligation and not a legal one. " If we accept these words in their literal sense, it would imply that a person who is bound by Statute to pay certain money is not bound by law to pay : and I do not think that can possibly have been the meaning of the Judges. What I think is their meaning is that the contractual obligation must be one between the person buying and the person who is bound by law to pay. But if that is so, the person buying would not need to have recourse to S. 69, for he could base his action on his contract. If that is the meaning of the words, I must respectfully dissent, for I prefer to accept the definition of the words " bound by law to pay " given by Beaman, J. in *Somashastri* v. *Swamirao Kashinath* (3), where he says : "Bound by law " does not mean "bound by law to the plaintiff, but that the defendant at the suit of any person might be compelled to pay." I entirely agree that this definition is the correct one and the same view is taken by a Bench of this Court in *Jagapati Raju* v. *Sadrusannama Arad* (4) where we find the following observation at page 801 : "The person who is interested in the payment mentioned in S. 69 must be a person who as between himself and the defendant was not bound to pay though the defendant may be under an obligation to pay to a third party." On the facts of that case it was

1. (1914) 26 M L J 66. 2. (1916) 32 M L J 347.
3. (1917) I L R 42 B 93 at 98. 4. (1915) I L R 39 M 795 : 29 M L J 659.

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Reddiar.

held that S. 69 was not applicable, but the same reasoning is adopted that we find in *Muthurakku Maniagaran* v. *Rakkappa* (1). The same view is taken in *Mothooranath Chuttopadhya* v. *Kristokumar Ghose* (5) and in *Chandradaya* v. *Bhagaban* (6). In this state of the authorities and also on the facts of this case, I am clearly of the opinion that S. 69 is applicable and that the plaintiff is entitled to recover the money he has paid.

There is one further argument put forward for the respondents relating to the question of the liability of the lands in 1st defendant's possession to be proceeded against for Rangaswami's decree. It is argued that the attachment of all the properties having been made before judgment and only plaintiff's property having been brought to sale, the other properties were no longer liable for the decree, apparently on the ground that the attachment ceased on the date of the judgment. I may note here that if that be so, the attachment of plaintiff's lands would also have ceased on that date, because the sale to him was after the date of the decree. But, I think, the 1st defendant is bound by the recital on his document which states that at the time when the lands were sold to him they were under attachment. Although there is no evidence let in to show that any subsequent steps were taken after the decree, the recital is binding on the defendant. I may also add that in the opinion of the Judges forming the Full Bench in *Meyyappa Chettiar* v. *Chidambaram Chettiar* (7) attachment before judgment continues in force until it is put an end to by the Court. It is, therefore, obvious in the circumstances that this attachment was continuing at the time of the sale to the plaintiff and the sale to the 1st defendant. This argument, therefore, does not help the 1st defendant in any way. The appeal must, therefore, be allowed, but the plaintiff is only entitled to a certain portion of his claim. The District Munsif disallowed a certain portion of the claim and although I think he was wrong in doing so, plaintiff filed his Memorandum of Objections too late, and it was dismissed. Consequently so far as that is concerned the order has become final. The Lower Appellate Court's decree is, therefore, set aside and the decree of the District Munsif restored with costs both here and in the Lower Appellate Court.

1. (1914) 26 M L J 66. 5. (1878) I L R 4 C 369.
6. (1915) 25 C L J 125. 7. (1923) I L R 47 M 485 : 46 M L J 415 (F B).

Rasappa Pillai v. Doraiswami Reddiar.

I may also note that 3rd defendant was not a party to the appeal in the District Court, and consequently the suit was dismissed as against him also, although in the judgment there is no discussion of his liability.

A. S. V. *Appellate decree set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Krishnamurthi Aiyar ... *Petitioner* (Accused)*

v.

Narayanaswami Aiyar ... *Respondent (Complainant)*

Krishnamurthi Aiyar v. Narayanaswami Aiyar.

Criminal trial—Procedure—Illegality—Setting aside of conviction on ground of—Single trial of charges under Ss 352 and 504, Indian Penal Code—Subsequent striking out of charge under S. 352, framing of charge under S. 504 alone and conviction under that section—Legality of—Criminal Procedure Code, S. 227—Effect.

A Magistrate inquired into a complaint and framed a charge under Ss. 352 and 504, Indian Penal Code. At the time of writing the judgment he discovered that the occurrences were different and that the charges under the two sections could not be tried together. But instead of starting separate enquiries in respect of the two offences, he struck out the charge framed already, framed a charge under S. 504 alone and asked the accused whether the prosecution witnesses were to be recalled and examined and whether he had any defence witnesses to examine, and, on the accused stating that he did not want to examine witnesses, convicted him under S. 504.

Held, that the procedure adopted by the Magistrate was illegal and was not warranted by S. 227, Criminal Procedure Code, and that the conviction was therefore liable to be set aside.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-divisional Magistrate of Tanjore in Criminal Appeal No. 16 of 1924, preferred against the judgment of the Court of the Stationary Second Class Magistrate of Papanasam in C. C. No. 170 of 1923.

K. S. Jayarama Aiyar for petitioner.

S. Panchapagesa Sastri for respondent.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER :—This is an application to revise the order of the Second Class Magistrate of Papanasam who convicted the

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*Cr. R. C. No. 440 of 1924 23rd January, 1925.
(Cr. R. P. No. 368 of 1924)

Krishnamurthi Aiyar v. Narayanaswami Aiyar.

petitioner under S. 504, Indian Penal Code, confirmed by the Sub-divisional Magistrate of Tanjore. The Magistrate inquired into the complaint preferred by the complainant and framed a charge under Ss. 352 and 504. At the time of writing the judgment he discovered that the occurrences were different and that the charges under Ss. 504 and 352 could not be tried together and finding the illegality of the charges, he struck out the charge framed, and framed a charge under S. 504 alone against the accused and asked the accused whether the prosecution witnesses were to be recalled and examined and whether he had any defence witnesses to examine. The accused stated that he did not want to examine witnesses and the Magistrate convicted him under S. 504.

It is contended before me that this procedure is irregular. Under the Criminal Procedure Code a Magistrate is entitled to try an accused for more than one offence in one trial, if the offences have been committed in the course of the same transaction or three different offences of the same kind committed during the course of a year. Here the offences were of different kinds committed at different times. The one was an assault and the other was an abuse. Therefore the Magistrate was wrong in trying the two charges in one trial. When he discovered the irregularity of it, instead of starting a fresh enquiry in respect of the two offences, that is, separate enquiries, one in respect of S. 504 and another in respect of S. 352 he struck out the charge framed already and framed a charge under S. 504. This procedure is not sanctioned by S. 227, Criminal Procedure Code ; and what could be done under S. 227 is only to alter or modify the charge at any time before judgment. But it does not permit the Court to try two distinct offences which are in no way connected with one another in the same trial. That the procedure adopted by the Sub-Magistrate is illegal is clear from the judgment of the late Chief Justice (Sir Arnold White) in *Manavala Chetti v. Emperor* (1).

The conviction is, therefore, set aside and considering the length of time that has elapsed since the occurrence I do not think I should order a re-trial. The fine imposed on the petitioner will be refunded to him.

A. S. V. *Conviction set aside: Fine refunded.*

1. (1906) I L R 29 M 569.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Mannargan and another ... *Appellants** (*Accused* 1 & 2)

Mannargan, *In re.*

Criminal trial—Procedure—Illegality—Setting aside of conviction on ground of—Defence Counsel—Prosecution suddenly putting, into witness-box in middle of trial—Legality of—Counsel giving evidence in case in which he is engaged—Propriety of.

If the prosecution thinks that the evidence of a particular individual will prove the case against the accused, his name should be mentioned in the charge sheet, and if the Police get information at a later stage that important evidence is likely to be got from the defence Counsel, the Police should make an application at the earliest opportunity so that the defence may not be prejudiced. It is very reprehensible tactics for the prosecution to call the Counsel who is actually conducting the defence as a witness for the prosecution in the middle of the case.

Where the prosecution put the defence Counsel in the witness-box on the day he appeared to conduct the defence of the accused thereby suddenly depriving the accused of the services of their Counsel, *held,* that the method adopted by the prosecution vitiated the trial, and that it was unnecessary to consider whether the accused had been prejudiced or not.

It is against the etiquette of the bar that Counsel should give evidence in the case in which he is engaged as Counsel, and a Counsel will not conduct a case for the defence after having been called as a witness for the prosecution.

Appeal against the order of the Court of the Third Presidency Magistrate, Georgetown, Madras, in Case No. 13074 (*a*) of the Calendar for 1923 (of Egmore).

V. L. Ethiraj for 1st appellant.

V. Rajagopalachari for 2nd appellant.

The Crown Prosecutor on behalf of the Crown.

The Court delivered the following

JUDGMENT :—The appellants have been convicted under Ss. 457 and 380, Indian Penal Code, and sentenced to imprisonment by the Third Presidency Magistrate, Madras. The case for the prosecution is that a theft of considerable property occurred on the 22nd May, 1923, and that some of the stolen property was traced to be in the possession of the appellants within six days of the commission of the offence. The trial did not commence till the middle of last year owing to the absence of the appellants from Madras. There is a considerable body of evidence on the side of the prosecution. In the view I take of the irregularities in the trial, it is unnecessary to consider this appeal on the merits. There were three cases

*Criminal Appeal No. 530 of 1924. 26th February, 1925.

Mannargan, *In re.*

before the Third Presidency Magistrate in which the 1st appellant was concerned. Dr. Swaminadhan, Bar-at-Law, appeared for the accused in all the three cases. The cross-examination of the witnesses in the two other cases was completed on 26th June, 1924 and all the cases were adjourned to 28th June, 1924, as there was no time to cross-examine the prosecution witnesses in the third case and on 28th June, 1924 Dr. Swaminadhan filed statements of the accused in the two cases and showed cause against charges being framed in them. After he completed his argument, the Prosecuting Inspector was heard on the side of the prosecution. All the three cases were adjourned to the 3rd of July, 1924. Late at night on the 2nd July, 1924, Dr. Swaminadhan was served with an urgent summons to attend the Court of the Third Presidency Magistrate on the following day to give evidence in the third case out of which this appeal has arisen. On 3rd July, 1924 the Magistrate discharged the two cases in which the prosecution had been closed and examined Dr. Swaminadhan as a witness for the prosecution in the present case. Dr. Swaminadhan very rightly thought it was not proper for him to appear for the defence inasmuch as he had been examined as a witness for the prosecution and ceased to appear from the 3rd July. The Magistrate framed a charge against the appellants on 4th July, 1924. There was no cross-examination of Dr. Swaminadhan on 3rd July, 1924, as the appellants had no Counsel to represent them that day.

It is contended before me by Mr. Ethiraj that the trial has been vitiated by the procedure adopted by the Magistrate in putting the defence Counsel in the box without proper notice to the accused and without allowing the accused an opportunity to engage some other Counsel to conduct the defence on the day on which Dr. Swaminadhan was examined as a witness.

The Crown Prosecutor urges that the Police had applied for summons on the 13th of June, 1924, and that Dr. Swaminadhan must have had information that he was going to be examined as a witness and that the accused have not been prejudiced by the procedure adopted by the Magistrate. In order to make clear what really happened on the day when Dr. Swaminadhan was examined as a witness, a letter of Dr. Swaminadhan written to Mr. Ethiraj, Counsel for the appellants, has been produced and that letter contains details as to what happened. As the Magistrate is said to be on leave

and as he is not likely to return to duty in a week or two I do not think it necessary to call for a report from him as to what happened. I accept as correct the statement made by Dr. Swaminadhan in his letter to Mr. Ethiraj as they are borne out by the records in the case.

The question is whether the trial has been vitiated by the procedure adopted by the Magistrate in this case. Dr. Swaminadhan was not mentioned as a witness in the charge sheet filed in the case. If the prosecution thought that Dr. Swaminadhan's evidence would materially help the case against the accused, one would naturally expect his name to be found in the charge sheet. If the police came to know after the charge sheet was filed that Dr. Swaminadhan could give material evidence against the accused he should have been cited at the earliest opportunity so as to allow the accused reasonable time to engage the services of a competent counsel. P. Ws. 1 to 7 were examined-in-chief on 3rd May, 1924, P. Ws. 8 to 10 on 16th May, 1924, P. Ws. 11 and 12 on 23rd May, 1924, P. Ws. 13 and 14 on 31st May, 1924 and P. W. 15 on 6th June, 1924. There were thus five hearings before 3rd July, 1924. There is nothing to show that on any one of these dates the accused were informed that their counsel was going to be called as a witness on the side of the prosecution. The fact that summons was served upon Dr. Swaminadhan late at night on the 2nd of July throws suspicion on the *bona fides* of the police in calling Dr. Swaminadhan as a witness for the prosecution, and this is strengthened by the fact that his evidence does not materially help the prosecution. The conduct of the police is highly reprehensible in applying to the Magistrate at a late stage of the case to summon the counsel for the accused as a witness for the prosecution. In the circumstances of the case I cannot but consider that the police have been guilty of a very mean and dirty trick in serving the summons upon Dr. Swaminadhan the night before the day to which the case against the accused stood adjourned. It is a matter for surprise that a Magistrate of considerable experience like the Third Presidency Magistrate should have so far yielded to the influence of the police as to summon the counsel for the defence as a prosecution witness without giving due notice to the accused so that they might engage a competent counsel. The Crown Prosecutor urges that as the accused cross-examined the prosecution witnesses on 15th August, 1924, they could not have been prejudiced by the action of

Mannargan, *In re.*

the Magistrate. This argument overlooks the fact that the services of a counsel are very necessary when witnesses are examined-in-chief to check not only leading questions but to prevent irrelevant evidence being recorded. If the prosecution wants to call the counsel for the defence as a witness on its side sufficient notice ought to be given to the accused to engage a competent counsel. I consider it to be very reprehensible to call a counsel who is actually defending an accused person as a prosecution witness. Such a course not only affects the proper conduct of the defence but it gives a handle to the prosecution to prevent a counsel who is well acquainted with the facts of the case from conducting the defence. The Crown Prosecutor relies upon *Weston and others* v. *Peary Mohan Dass* (1) and contends that it is not incompetent for a counsel to give evidence in the case in which he is briefed. The question here is not the competency of a counsel engaged in a case to give evidence for one party or the other. The real question is, whether a counsel, who is conducting the defence of the accused and who is well instructed and is well acquainted with the facts of the case could be suddently called upon to give evidence for the prosecution without safeguarding the interests of the accused by giving ample time to the accused to engage the services of a competent counsel. Even if time be granted to the accused to engage some other counsel, I consider it very reprehensible tactics for the prosecution to call the counsel who is actually conducting the defence as a witness for the prosecution in the middle of the case. The prosecution, if it thinks that the evidence of a particular individual will prove the case against the accused, his name should be mentioned in the charge sheet and if the police get information at a later stage that important evidence is likely to be got from the defence counsel, the police should make an application at the earliest opportunity so that the defence may not be prejudiced. In this case, I have not the slightest hesitation in holding that the method pursued by the police and the action of the Magistrate in putting Dr. Swaminadhan in the witness-box on the day he appeared to conduct the defence of the accused has vitiated the trial, and it is unnecessary to consider whether the accused have been prejudiced or not. It is opposed to all principles of criminal jurisprudence for the prosecution to deprive the accused suddenly of the service of

1. (1912) I L R 40 C 898.

their counsel. The argument that Dr. Swaminadhan could have appeared for the accused after that date is untenable, for, it is against the etiquette of the bar that a counsel should give evidence in the case in which he is engaged as counsel, and no self-respecting counsel would like to conduct a case for the defence after having been called as a witness for the prosecution. I consider the conduct of Dr. Swaminadhan in retiring from the case as the only proper course open to him. I cannot too strongly condemn the action of the police in calling Dr. Swaminadhan as a prosecution witness after knowing probably that the other cases against the accused were collapsing ; and the action of the Magistrate in allowing himself to be a tool in the hands of the police and in framing a charge on the 4th before the cross-examination of Dr. Swaminadhan was completed, is open to grave censure.

There are other irregularities in the trial, such as the admission of inadmissible evidence like Exs. I and II. Taking all the circumstances into consideration, I consider the trial has been vitiated by the procedure adopted by the Magistrate: and there is no other course open but to set aside the conviction of the appellants and to direct that they be tried by the Chief Presidency Magistrate.

A. S. V. *Conviction set aside : Appeal remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE WALLACE.

Kizhakkepat Krishna Menon ... *Appellant in both cases**
(Plaintiff in both O. S.)

v.

Marambatte Unni Mamu and others ... *Respondents.*

Krishna Menon *v.* Unni Mamu.

Malabar Compensation for Tenants Improvements Act of 1899, S 4—Ejectment suit—Improvement on land whether effected by tenant—Presumption—Onus of proof.

The effect of S. 4 of the Malabar Compensation for Tenants Improvements Act of 1899 is to throw upon the landlord, when once it is shown that one crop land has been converted into two crop land, the burden of proving that this was not due to anything done or spent by the tenant. The onus is not on the tenant to show that the improvement was definitely due to his own exertions.

Second Appeals against the decree of the Court of the Subordinate Judge of Ottapalam in A. S. Nos. 18 and 24 of

*S A Nos. 176 and 549 of 1921. 22nd February, 1924.

Krishna Menon v. Unni Mamu.

1914, and in A. S. No. 29 of 1914, preferred against the decree of the Court of the District Munsif of Walluvanad in O. S. Nos. 488 and 489 of 1912 respectively.

K. P. Menon for appellant.

The Advocate-General for respondents.

The Judgment of the Court was delivered by

Coutts Trotter, C. J.

The Chief Justice :—In this case the plaintiff sued for the recovery of lands let to the defendants who were his tenants. Under the Malabar Compensation for Tenants Improvements Act of 1899, it is well known that the landlord is bound to compensate the tenant on ejectment for the improvements effected by the tenant. In this case the improvement that is in dispute in second appeal was an improvement alleged to consist of the conversion of one crop into two crop land, described in the suit as item (1). The case for the tenants was that this land, having been at one time one crop land, had at the time of the ejectment become two crop land, and having regard to the provisions of S. 4 of the Act, that was enough for them, because the effect of that section clearly is to throw upon the landlord, when once it is shown that one crop land has been converted into two crop land, the burden of proving that this was not due to anything done or spent by the tenant. In this case the story set up by the landlord in the Courts below was that this land had been two crop land throughout its history, or, at any rate, throughout its history under the tenancy of the defendants or their predecessors-in-title. That is dealt with by both the Courts below, by the learned Subordinate Judge in paragraph 9 of his judgment and by the District Munsif in paragraph 15 of his judgment, and it is clear therefrom that those learned Judges rejected the story, and the only story at that time, put up by the plaintiff to rebut the presumption created by S. 4 of the Act. Now it is sought to be said that, because the word "improvements" in the section is paraphrased by the words "works or the products of such works," therefore, we must demand proof that the improvement, the conversion of one crop land into two crop land, was definitely due to the exertions of the tenant or otherwise it cannot be described as "work." It appears to us that to accede to such an argument would in effect be to throw the burden of proof in the opposite direction to where the statute has deliberately indicated that it should lie. In support of this contention refer-

Krishna Menon v. Unni Mamu. — Coutts Trotter, C. J.

ence is made to the case of *Kunnath Madampil Kunjunni* v. *Mannarghat Ramunni* (1). I do not think it is necessary for me to say very much about that case. I observe that, so far as appears from the report, no reference is made to the all-important section of the statute, S. 4, and I will content myself at this stage with saying that I am by no means clear that that case was rightly decided and that I reserve for myself the right to reconsider the correctness of that decision if, at any future occasion, it should be directly challenged.

The result is that S. A. No. 176 is dismissed with costs. S. A. No. 549 follows S. A. No. 176 and it is also dismissed with costs. Time for redemption extended by three months.

A. S. V. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE SRINIVASA AIYANGAR.

Arjee Prabappa Chetti ... *Appellant**

v.

Koneti Desikachari ... *Respondent.*

Prabappa Chetti v. Desikachari.

Limitation Act, Art. 183—Payment within meaning of—What amounts to—Payment for judgment-debtor or on his account if sufficient—Execution of decree—Transferee decree-holder—Application to be brought on record in place of original decree-holder—Not necessary.

The holder of a decree passed by the High Court on its Original Side died without drawing from the Court a sum of money ordered to be paid to him by order, dated 6th October, 1909. Subsequently, the Administrator-General of Madras, as Administrator-General *pendente lite* in the administration suit relating to the deceased's estate applied to the Court for the payment to him of the entire sum standing on that date to the credit of the suit and an order was passed on 9th January, 1912 directing such payment.

On an application for execution filed within 12 years of 9th January, 1912 and *a fortiori* within 12 years from the date on which the payment out was made from the Court, it was contended that the application was barred because the application by the Administrator-General was not a proper application inasmuch as, previous to that application, he had not brought himself on record in the place of the deceased decree-holder, and because the payment out was not a payment within the meaning of Art. 183 of the Limitation Act inasmuch as it was not a payment either by the judgment-debtor himself or by some duly constituted agent or some person acting on his behalf.

Held, overruling both pleas, that the application for execution was not barred.

Neither the Civil Procedure Code, nor the rules on the Original Side con-

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*O. S. Appeal No. 92 of 1923. 12th November, 1924.

1. (1917) 35 M L J 219.

Prabappa Chetti v. Desikachari.

template an application by a person to be brought on the record in the place of a deceased decree-holder. All that is necessary is that the person who becomes by operation of law entitled to have execution is required only to make an application for execution.

Under Art. 183 the payment is not required to be made either by the debtor or by some person acting on his behalf. Even if payment is for the judgment-debtor or on his account it would be a payment that will save limitation giving rise to a fresh starting point.

On appeal from the judgment, dated 30th August, 1923, of the Hon'ble Mr. Justice Kumaraswami Sastri, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 188 of 1903.

T. Krishnaswami Aiyangar for appellant.

M. Sundaram for respondent.

The Court delivered the following

Srinivasa Aiyangar, J.

JUDGMENTS :—*Srinivasa Aiyangar, J.* :—This is an appeal from an order of Kumaraswami Sastri, J., ordering execution on an execution application made by the assignee of a decree. Objection was taken to the execution application on the ground that it was barred by limitation. The article applicable to the application in question for execution is Art. 183, because it was in respect of a decree passed on the Original Side of this Court. Under that Article the decree-holder has twelve years not only from the date on which he becomes entitled to enforce the decree but also twelve years from the date on which some part of the principal money secured thereby or some interest on such money has been paid. In this case, we find that M. Sabapathy Chetti, the original decree-holder, died without drawing from the Court the sum of Rs. 24,000 odd ordered to be paid to him by order, dated the 6th October, 1909. Subsequently, the Administrator-General of Madras, I believe, as Administrator-General *pendente lite* in the administration suit relating to Sabapathy's estate applied to the Court for the payment to him of the entire sum of Rs. 25,932 standing on that date to the credit of the suit, and Wallis, J. passed an order directing such payment on the 9th January, 1912. The present application for execution is within twelve years from that date and *a fortiori* is within twelve years from the date on which the payment out was made from the Court.

It has been sought to be argued by the learned Vakil for the appellant that it was not a proper application by the Administrator-General, because, previous to that application,

Prabappa Chetti v. Deelkachari.

Srinivasa Aiyangar, J.

he had not brought himself on the record in the place of the deceased decree-holder. No such process is contemplated by the procedure laid down either in the Procedure Code or in the rules on the Original Side and all that is necessary is that the person who becomes by operation of law entitled to have execution is required only to make an application for execution.

It has next been argued that the payment referred to in Art. 183 must have been a payment either by the judgment-debtor himself or by some duly constituted agent or some person acting on his behalf. In S. 20 of the Limitation Act, where a part payment is referred to as giving rise to a further starting of limitation, it is significant that it is prescribed that, for the purpose of saving limitation, the part of the principal of a debt should be paid by the debtor or by his agent duly authorised in that behalf, but, in Art. 183, however, there are no such words to be found after the words "some part of the principal money secured thereby or some interest on such money has been paid." The payment is not therefore required to be made either by the debtor or by some person acting on his behalf. The difference in the wording is significant, and, I cannot help thinking, fully intended. It therefore follows that, even if payment is for the judgment-debtor or on his account it would be a payment that will save limitation giving rise to a fresh starting point.

In this view it is unnecessary to consider the decision in the case of *Govinda Pillai* v. *Dasai Goundan* (1). That was under Art. 182 of the Limitation Act and had reference to the special terms of S. 20 of the Limitation Act. It is, therefore, unnecessary to consider whether a Court of Law can be deemed to be an agent duly authorised on behalf of a debtor to make any such payment as would save limitation.

The execution application is therefore not barred by the Law of Limitation, and the learned Judge was right in ordering execution. The appeal therefore fails and is dismissed with costs.

Coutts Trotter, C. J.

The Chief Justice :—I am of the same opinion. No doubt if the matter has to be considered one might find that it was necessary to put some qualification on the latitude of the language of Art. 183 to obviate the contingency referred

1. (1921) 41 M L J 423.

Prabappa Chetti v. Desikachari. — Coutts Trotter, C. J.

to by Lord Westbury in *Chinnery* v. *Evans* (2) and by the learned Judges in the Irish case *Brew* v. *Brew* (3). That contingency is the possibility of a payment made by a mere volunteer being sought in aid to affect adversely the rights of third parties. But we need not consider that here, because it cannot be suggested that either the Court or the Administrator-General were not persons who were dealing with the estate of the deceased not as volunteers but clothed in the definite functions in regard to it.

I agree that the appeal fails and must be dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

Ponnappa Reddi and others ... *Appellants* in A. A. A. No.* 65 *of* 1923—*Petitioner in C. M. P. No.* 3143 *of* 1924 (*Petitioners* 1 *to* 8 *and* 2*nd Respondent*)

v.

P. Thiruvengada Pillai and Company, by partners, P. Thiruvengadam Pillai and another ... *Respondents in both* (1*st and* 2*nd Respondents*).

Ponnappa Reddi v. Thiruvengada Pillai & Co.

Execution of decree—Decree of Madras Court of Small Causes—Transmission to Munsif's Court for execution on its regular side—Attachment of immoveable property in execution by Munsif—Claim to property attached—Order allowing—Appeal from—Right of—Estoppel—Money suit against remaining members of deceased debtor's family—Plea by them that they and the deceased were divided—Subsequent plea by them in execution that they and the deceased were undivided—Maintainability.

A decree of the Madras Court of Small Causes was transferred to a District Munsif's Court to be executed not in its Small Cause Side but on its Original side. Immoveable property of the defendants was attached in execution of the decree by the Munsif, and a petition put in for releasing the property from attachment was allowed by him. On appeal, however, the District Judge set aside the order of the Munsif and upheld the attachment.

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*A. A. A. O. No. 65 of 1923. 26th January, 1925.
(C M P No. 3143 of 1924.)

2. (1864) 11 H L C 115. 3. (1899) 2 I R 163

Held, that the District Judge had jurisdiction to hear the appeal and that his order was not without jurisdiction.

Pon nappa Reddi v. Thiruvengada Pillai & Co.

In a suit for money brought against the remaining members of the family of a deceased debtor, the defendants raised the plea that they and the deceased were not members of an undivided Hindu family, and a decree was accordingly passed for the suit amount against the assets of the deceased if any in the hands of the defendants.

Held, that in the face of that plea it was not open to the defendants to contend in execution that they and the deceased were undivided in interest and that they succeeded to his property by survivorship.

Appeal against the decree of the District Court of Chingleput in A. S. No 362 of 1921 preferred against the decree of the Court of the District Munsif of Tiruvallur in Execution Application No. 735 of 1921 in E. P. No. 554 of 1921 (in Suit No. 1525 of 1920 on the file of the Court of Small Causes at Madras); and Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to convert the A. A. A. O. No. 65 of 1923 into a Civil Revision Petition.

S. Krishnamachariar and *N. R. Sesha Aiyar* for appellants

S. G. Satagopa Mudaliar for respondents.

The Court delivered the following

JUDGMENT :—The Madras Court of Small Causes passed a decree in plaintiffs' favour for Rs. 1,386-10-9 and costs and Vakil's fee Rs. 60 against the assets of the deceased Angusamy if any in the hands of the defendants. This decree was transferred to the District Munsif's Court at Tiruvallur. The plaintiffs attached some property as the assets of Angusamy in the hands of the defendants. The defendants 1 to 8 applied to the District Munsif of Tiruvallur for releasing the property from attachment on the ground that the properties were the joint family properties of the defendants 1 to 8 and Angusamy and that they were entitled to them by right or survivorship after the death of Angusamy. The District Munsif allowed the petition, and on appeal by the decree-holders the District Judge set aside the order of the District Munsif and upheld the attachment so far as the share of Angusamy was concerned. Against this order the present appeal is filed by defendants 1 to 8. The first contention on behalf of the appellants is that no appeal lay to the District Court against the order of the District Munsif. The argument is that the District Munsif's Court is governed by the rules framed by the High Court under the Presidency Small

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Cause Courts Act XV of 1882, and under the rules no appeal is provided for against an order in execution. The decree of the Madras Small Cause Court was transferred to the Tiruvallur Court to be executed not in its Small Cause side but on its regular side. Under the rules the Madras Small Cause Court has no power to execute its decrees against immoveable properties. Under S. 31 of the Act the Madras Small Cause Court may, on the application of the decree-holder, send the decree for execution.

(*a*) In the case of the execution against immoveable property situate within such local limit—(to the Madras City Civil Court or the High Court of Judicature at Fort William or Bombay as the case may be); (*b*) in all other cases—to any Civil Court within the local limits of whose jurisdiction such judgment-debtor, or any moveable or immoveable property of such judgment-debtor may be found. The procedure prescribed by the Code of Civil Procedure for the execution of decrees by Courts other than those which made them shall be the procedure followed in such cases. S. 8 of the Civil Procedure Code makes only certain sections of the Civil Procedure Code applicable to the Court of Small Causes established in the Town of Calcutta, Madras and Bombay. No doubt Ss. 38, 39, 40 and 41 are not among the sections applicable to the proceedings in the Madras Small Cause Court, but the question is not what is the procedure governing the execution in the Madras Small Cause Court, but what is the procedure governing executions in the District Munsif's Court to which the decree of the Small Cause Court is transferred for execution. It is conceded that the District Munsif's Court in executing a decree of the Madras Small Cause Court exercises its powers not as a Small Cause Court but as a Court of Original Jurisdiction, for, in execution of the decree immoveable property could be attached. If immoveable property is attached the provisions which relate to claim petitions and other provisions of O. 21 of the Civil Procedure Code would apply to attachment and sale of immoveable property. The contention for the appellants is that the Small Cause decree which has been transferred to the Tiruvallur Court retains its character of a Small Cause decree and the rules governing its execution in the Madras Small Cause Court are applicable to the proceedings in the Tiruvallur Munsif's Court. Some provisions of the Civil Procedure Code are made applicable to the Madras Small Cause Court by notification of 17th May, 1916, and S. 42

of the Code in its amended form is one of them and it is in these terms : " The Court executing a decree sent to it shall have the same powers in executing such a decree as if it had been passed by itself. . . .And its order in executing such decrees shall be subject to the same rules in respect of application under S. 38 of Act XV of 1882 as if the decree has been passed by itself." It does not either expressly or impliedly apply to the proceedings in the Court to which a decree of the Madras Small Cause Court has been transferred. The amended section is only applicable to the Madras Court of Small Causes. There is no substance in the contention that the High Court intended that this section should apply to the District Munsif's Court or to any other Court in the mofussal to which the decree of the Madras Small Cause Court is sent for execution. The latter portion of the rule makes it abundantly clear that it could not have been the intention of the High Court to make it applicable to any Court other than the Madras Court of Small Causes. The latter portion of the rule makes S. 38 of the Madras Small Cause Courts Act apply to execution proceedings. Under S. 38 a defeated party may apply for a new trial or may apply to alter or set aside an order passed by the Court. Applications for a fresh trial are made before the Full Bench consisting of two or more Judges which either confirms or alters the order of decree passed by a single Judge. To say that S. 38 is applicable to execution proceedings in the Munsif's Court is to make the proceedings there a farce, for, a party against whom the District Munsif passes an order could apply for a new trial within 8 days. Is the same Judge to be asked to try a matter which he has heard and disposed of or is he to be asked to alter or set aside or reverse any order passed by him if the party against whom the order is made chooses to apply within 8 days for the reversal of that order ? It cannot therefore be reasonably contended that S. 42. is applicable to proceedings in execution of a decree of the Madras Small Cause Court transferred to a Court in mofussal. Apart from that it is difficult to contend how the High Court by framing certain rules under the Presidency Small Cause Courts Act abrogate or nullify the Civil Procedure Code and the rules thereunder which govern the proceedings in the Courts in the mofussal. S. 42 only applies to execution proceedings in the Madras Small Cause Court, whether the decree sought to be executed was passed by the Madras Small Cause Court or transferred to that Court from a Court in the mofussal.

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It is next contended that the right of appeal can only be given by a statute, and the rules of procedure cannot give a right of appeal when it is not given by a statute. It is well settled that when a Small Cause decree of the Sub-Court or of a District Munsif's Court is transferred to the Original Side of the Sub-Court or of the Munsif's Court for execution against the immoveable property of the judgment-debtor there is a right of appeal under S. 47 of the Civil Procedure Code, and the rules applicable to the proceedings in execution of the original decree are applicable to the execution proceedings of the Small Cause decree transferred to the Original Side of a Court. The decree of the Madras Small Cause Court having been transferred to the original jurisdiction of the District Munsif's Court, it is difficult to see how it can be said that the Civil Procedure Code is not applicable to such proceedings. If the Civil Procedure Code is applicable the right given under the Code is also available to the parties to the execution proceedings. The moment the Civil Procedure Code is made applicable to the proceedings in a Court, unless some portions of it are exempted by a special rule or enactment from being applicable to the proceedings of such Court the whole Code is applicable and a party has the right of appeal which that Code gives. There is, therefore, no substance in the contention that the appeal by the decree-holders was incompetent. The District Judge had jurisdiction to hear an appeal from the decision of the District Munsif and his order is not without jurisdiction.

The next contention is that the learned District Judge was wrong in holding that the judgment-debtors were estopped from setting up the plea that they and Angusamy were members of the joint Hindu family. When the case came on for trial in the Madras Court of Small Causes, the defendants distinctly raised the following pleas amongst others : "(1) Deceased Angusamy and defendants 1 to 8 are not members of an undivided family. (2) Angusamy did not carry on any business for the benefit of defendants 1 to 8. (3) Defendants 1 to 8 have no concern in the plaint transaction and are not liable." The learned Judge who heard the case gave a decree against the assets of Angusamy in the hands of the defendants. They distinctly put forward the contention that Angusamy was divided from them, and on that plea the Small Cause Court gave a decree against his assets in their hands. In the face of that plea and the judgment it is not open to the

defendants now to contend that they and Angusamy were undivided in interest and that they succeeded to his property by survivorship. The District Judge was right in holding that it was not open to the defendants to raise the contention they did.

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In the result the Civil Miscellaneous Second Appeal is dismissed with costs. The connected Civil Miscellaneous Petition is also dismissed.

A. S. V. *Both Appeal and petition dismissed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD SUMNER, LORD BLANESBURGH, SIR JOHN EDGE, MR. AMEER ALI AND LORD SALVESEN.

Sura Lakshmiah Chetty and others ... *Appellants**

v.

Kothandarama Pillai .. *Respondents.*

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Lakshmiah Chetty v. Kothandarama Pillai.

Hindu Law—Purchase of property by husband in name of wife—Question whether in pursuance of ante-nuptial agreement, or a benami transaction.

A purchase by an Indian husband of property in India in the name of his wife, unless otherwise explained, is presumed to be a *benami* transaction, by which the beneficial interest in the property is in the husband, and the ostensible title in the wife.

The rule of English Law, that such a purchase is assumed to be for the advancement of the wife, does not apply in India.

Gopeekrist v. *Gungapursaud*, 6 Moo. I A. 53; *Moulvie Sayyud Uzhur Ali* v. *Mussumat Bebee Ultaf Fatima*, 13 Moo I A 232 ; *Bilas Kunwar* v. *Desraj Ranjit Singh*, 42 I A 202 ; *Ram Narain* v. *Muhammad Hadi*, 26 I A 38 referred to.

Appeal from a decree of the High Court (15th August, 1922, Schwabe, C. J. and Wallace, J.) reversing a decree of the same Court in its Original Jurisdiction (31st August, 1921, Phillips, J.).

The facts sufficiently appear from the judgment of their Lordships.

L. de Gruyther, K. C. and *E. B. Raikes* for appellants.

K. V. L. Narasimham for respondent.

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*P C Appeal No. 8 of 1924. 22nd May, 1925.

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22nd May, 1925. The Judgment of the Board was delivered by

SIR JOHN EDGE.—This is an appeal from a decree, dated the 15th August, 1922, of the High Court of Madras, which reversed a decree, dated the 31st August, 1921, of the same Court made in its Ordinary Original Civil Jurisdiction, which had dismissed the suit.

The suit in which this appeal has arisen was brought in the High Court of Madras on the 19th November, 1918, by the plaintiff, a minor, by his next friend, against the Official Assignee of Madras and three moneylenders. One of the moneylenders died, and his legal representative was brought on the record as a defendant. The plaintiff is the respondent in this appeal.

The plaintiff is the son of Vl. S. Chockalingam Pillai, a Hindu of the Vellala caste, by his wife, Lakshmi Ammal, who died before the suit was brought. The plaintiff is the sole heir of his late mother, and he claims the property to which the suit relates as her heir. On the 30th September, 1918, the plaintiff's father, Chockalingam, was adjudged insolvent by the High Court of Madras under the Presidency-Towns Insolvency Act, 1909 (Act III of 1909). The plaintiff claims in his suit, with other reliefs, a declaration that a piece of land with a dwelling-house and buildings thereon, being Nos. 4 and 5, Nainiappa Naick Street, are his exclusive property as the heir of his mother, and that his father, Chockalingam, had no beneficial or other interest in those properties, which could have vested in the Official Assignee or have been assigned by him in mortgage. 4 and 5, Nainiappa Naick Street will, in this judgment, be referred to as the property in question.

The land and buildings then thereon were purchased by Chockalingam on the 12th May, 1909, and by the sale-deed were conveyed by the vendors to Lakshmi, who had been married to Chockalingam some years previously. The question upon the answer to which this suit depends is whether Chockalingam had purchased that property in 1909 for his wife Lakshmi in performance of an antenuptial agreement alleged to have been made by him to settle a house upon her, or whether the purchase was made in her name as benamidar for Chockalingam. There can be no doubt now that a purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted

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facts is to be regarded as a benami transaction by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife. The rule of the law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply in India. See *Gopeekrist* v. *Gungapursaud* (1); *Moulvie Sayyud Uzhur Ali* v. *Mussumat Bebee Ultaf Fatima* (2); and *Bilas Kunwar* v. *Desraj Ranjit Singh* (3). If the plaintiff failed to prove that antenuptial agreement and that it was in performance of it that the property in question was purchased by Chockalingam in Lakshmi's name, his suit fails.

Chockalingam has not been called by either side to give evidence in the suit, and his absence from the witness box has not been satisfactorily explained.

The facts, so far as they can be ascertained by their Lordships from the record, are as follows :—Chockalingam and Vinayatheertha Pillai, who died in 1898 or in 1899, were trading as pea merchants in partnership at 6, Mint Street, in Madras. When that partnership commenced their Lordships do not know. It does not appear what the interest of the partners respectively was in the house, 6, Mint Street, or in the partnership. But 6, Mint Street, was the property of the partnership. Vinayatheertha left surviving him two young children, a son Vadivelu, who was living when the witnesses were giving their evidence in the suit, and a daughter Lakshmi, and his mother Kathayee, who gave evidence in this suit. After Vinayatheertha died his mother Kathayee carried on the family business in partnership with Chockalingam at 6, Mint Street, and Kathayee and the two young children of Vinayatheertha continued to live in that house together with Chockalingam. Chockalingam married Lakshmi, according to the plaint in or about 1907, or, according to the evidence of witnesses who were relations of Lakshmi, in 1909. At the time of the marriage Chockalingam had two wives living, one of whom was living with him, and he also had a son living. According to the evidence of Kathayee and two relations of Lakshmi, if it may be credited, when Chockalingam asked for Lakshmi in marriage, Kathayee, acting on the advice of relations, said to him that she would

1. (1854) 6 Moore's I A 53. 2. (1869) 13 Moore's I A 232.
3. (1915) L R 42 I A 202 : 29 M L J 535.

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give him Lakshmi in marriage if he would make a provision for her, but not otherwise, and asked him what provision he would make for Lakshmi, and he said that, if the Mint Street house were sold, another house might be purchased and be given to Lakshmi. Thereupon she, Kathayee, gave Lakshmi to Chockalingam in marriage. That was the antenuptial agreement which is alleged by the plaintiff to have been made. A railway company was negotiating for the purchase of the Mint Street house, and purchased it for the price of Rs. 10,315-8-0 from Chockalingam and Kathayee, and paid the price to them. It is to be presumed that the money then paid by the railway company to Kathayee was, or part of it was, received by her for and on behalf of her grandson Vadivelu, who does not appear to have had any other person to look after his interests.

In 1904 Chockalingam had purchased, apparently with his own money, houses 12 and 13, Memorial Hall Street, in Madras, and he, in 1909, mortgaged those houses for Rs. 9,000, and their Lordships consider it probable that Chockalingam, on the 12th May, 1909, had other property apart from his interest in the pea dealing partnership and in the Mint Street house, and there is no reason shown why all the purchase money of the property in question was not Chockalingam's own money. Certainly none of it is shown to have been Lakshmi's.

Mr. Justice Phillips, who tried the suit, did not believe the evidence that there had been an antenuptial agreement, and he found that the purchase of the property in question on the 12th May, 1909, in the name of Lakshmi was a benami transaction and that she was merely benamidar for her husband Chockalingam. Mr. Justice Phillips in his judgment made a statement with which their Lordships agree. He said :—

"We do not know what really happened to Vinayatheertha's property when he died or what share he had in the business or whether really he did leave any property which was undisposed of at the date of Lakshmi's marriage. There is no evidence about these facts on either side though the plaintiff's family ought to know all that can be known about this."

It will be remembered that Vinayatheertha had died in 1898 or in 1899, and the property in question was purchased in May, 1909. Mr. Justice Phillips rightly found as to the

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money which was invested in the purchase of the property in question that if the purchase money did not belong to Chockalingam it did not belong to Lakshmi, but belonged to her brother Vadivelu. Mr. Justice Phillips by his decree dismissed the suit. From that decree the plaintiff appealed under the Letters Patent.

The appeal under the Letters Patent was heard by Sir W. S. Schwabe, C. J., and Mr. Justice Wallace. The Chief Justice stated in his judgment :—

that "the question to be decided is whether a purchase of property by one Chockalinga, an insolvent, in the name of his wife, Lakshmi, was a settlement on her on her marriage or was a benami transaction, she being benamidar for him. The evidence called was all one way, namely, that the property was purchased out of funds belonging 6|11 (six-elevenths) to Chockalinga and 5|11 (five-elevenths) to Lakshmi's infant brother Vadivelu, as the heir to his father, formerly a partner of Chockalinga."

If there was such evidence as to the respective shares of Chockalingam and Vadivelu, the attention of their Lordships has not been drawn to it, and if there had been such evidence it would not show that Lakshmi had acquired a beneficial title to the property. Vadivelu was a minor on the 12th May, 1909, and could not make a present of his property to his sister, Lakshmi. Mr. Justice Wallace agreed with the judgment of the Chief Justice.

They accepted the evidence that the alleged antenuptial agreement had been made and gave the plaintiff the decree which he claimed. From their decree this appeal has been brought.

It would, no doubt, have been prudent on the part of Kathayee and Lakshmi's relations to have insisted before Lakshmi was given in marriage to Chockalingam, who was an old man with two wives and a son living, that he should agree to settle some property on her. It is obvious to their Lordships that Lakshmi had no property of her own. She was not the heir to any property and could have had no expectations of succeeding to any property. Possibly, Chockalingam may have been asked to promise to make a settlement on Lakshmi, but the question is : Did he agree to do so ? It appears to their Lordships that most probably the story of this alleged agreement to make a settlement was first thought of after Chockalingam's insolvency in order to save for the plaintiff some part of the property of the insolvent. The property in question was purchased in May, 1909, and Lakshmi

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lived until 1912 and if Chockalingam had agreed to settle the property in question there was plenty of time in which he could have executed a proper deed of settlement upon her.

In their Lordships' opinion it would be unwise to accept as proved such an oral agreement as is alleged on the part of the plaintiff except on the clearest and most satisfactory evidence of credible witnesses, and after giving the most careful consideration to the evidence in this suit their Lordships agree with Mr. Justice Phillips and find that Chockalingam did not agree to make any settlement upon Lakshmi and that she had no beneficial interest in the property in question and was a mere benamidar for Chockalingam.

If it were necessary in this case to ascertain by evidence whether her position was that of a beneficial owner of the property in question and not that of a mere benamidar for Chockalingam, the transaction which will now be referred to would be material evidence. See *Pandit Ram Narain* v. *Maulvi Muhammad Hadi* (4) and the cases already cited. The property in question was purchased on the 12th May, 1909. On the 25th July, 1909, Chockalingam and Lakshmi jointly gave what was apparently treated as an equitable mortgage to S. Krishnaswami Aiyangar of the property which had been purchased on the 12th May, 1909, in her name, which they stated was "in our possession and enjoyment." On the 30th March, 1910, Chockalingam and Lakshmi jointly granted a lease of the property in question to Sirakalai Pillai. On the 4th December, 1912, Lakshmi died. On the 18th March, 1914, Chockalingam on his representation that he "is in possession of and is entitled to" the property in question obtained in the Registration Department the Collector's certificate. On the 21st February, 1918, Chockalingam mortgaged the property in question to C. Vythialingam Pillai and in the deed of mortgage it was stated that he had purchased the property in question out of his own self-acquired earnings and was absolutely entitled to it. As to these transactions by Chockalingam after the 12th May, 1909, it is only fair to the plaintiff to bear in mind that his mother was, until she died, under the influence of her husband Chockalingam, and seems to have had no independent advice, and that the plaintiff was a minor of tender years without any one, except his great grandmother, an aged woman, to protect the interest, if any,

4. (1898) L R 26 I A 38.

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which he may have had. But those transactions show how Chockalingam dealt with the property in question.

Their Lordships do not decide that an antenuptial agreement may not be orally proved in an Indian case, but they consider that it would be unwise of a Judge to act in a disputed Indian case upon oral evidence that there had been an antenuptial agreement, which would in effect be a marriage settlement, unless there was contemporaneous written evidence to corroborate oral evidence. In this case there was no such evidence.

Their Lordships will humbly advise His Majesty that this appeal should be allowed with costs and the decree appealed against should be set aside with costs and the decree of Mr. Justice Phillip's be restored.

Solicitors for appellants : *Josselyn and Elwes.*

Solicitor for respondent : *H. S. L. Polak.*

A. de M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

R. Palavesam Chettiar ... *Petitioner** (*Plaintiff*)

v.

Narayana Aiyar ... *Respondent* (*Defendant*)

Palavesam Chettiar v Narayana Aiyar..

Arbitration—Arbitrators—Personal knowledge of—Importation into case of—Legality—Test—Evidence—Taking of, in the absence of either party—Legality of.

Whether arbitrators could import their own personal knowledge into the consideration of the case before them would depend upon the terms of the submission to arbitration. If the submission simply asks the arbitrators to decide a case that would not give them a right to import their own personal knowledge into the consideration of the case. But where the submission to arbitration gives them an option either to take evidence or to decide the case upon their own personal knowledge they would be entitled to import into the consideration of the case their own personal knowledge.

It is illegal on the part of the arbitrators to take evidence in the absence of either party.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Ambasamudram in S. C. S. No. 1738 of 1921.

S. Ramaswami Aiyar for petitioner.

T. L. Venkatarama Aiyar for respondent.

*C R P No. 190 of 1923. 20th February, 1925.

Palavesam Chettiar v. Narayana Aiyar.

The Court delivered the following

JUDGMENT :—This is a petition to revise the order of the District Munsif of Ambasamudram declining to set aside an award passed by the arbitrators in S. C. S. No. 1738 of 1921. The first contention urged by Mr. Ramaswami Aiyar against the judgment of the Lower Court is that the arbitrators imported into the consideration of the case matters within their own personal knowledge. In giving grounds for their decision the arbitrators say : " And we also know that whenever he came here he may have purchased oil from this plaintiff or other oil-mongers only upon the payment of ready cash and that otherwise there was no necessity for him to have such large dealings. " The District Munsif dealing with this objection says : " No doubt the arbitrators have imported personal knowledge. They are entitled to do so and parties who consented to the arbitration would clearly have known that the arbitrators must have some local knowledge and would import such knowledge in deciding the case. " Whether the arbitrators could import their own personal knowledge into the consideration of the case before them would depend upon the terms of submission to arbitration. If the submission simply asks the arbitrators to decide a case that would not give them a right to import their own personal knowledge into the consideration of the case. But where the submission to arbitration gives them an option either to take evidence or to decide the case upon their own personal knowledge they would be entitled to import into the consideration of the case their own personal knowledge. This is the view of Mr. Justice Lindsay in *Lakshmi Narain* v. *Sheonath Pande* (1). The learned Judge observes : "This matter has to be determined in the light of the language of the agreement by which the dispute was referred to arbitration. If the parties agreed that the arbitrator should decide the dispute between them on his own knowledge, and further agreed that there was no need for him to take any evidence, no misconduct can be imputed. " In this case, the reference to the arbitration does not say that the arbitrators were to decide the matter in controversy upon their own personal knowledge. On the other hand the reference to arbitration simply asks them to decide the dispute between the plaintiff and the defendants. That being so, they cannot import into the consideration of the case anything derived from their own personal knowledge.

1. (1919) I L R 42 A 185 at 187.

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Apart from this objection there is a more serious objection to the award. In paragraph 5 of the grounds attached to the award they say, "it is learnt that this defendant lived along with his wife at Sankarankoil on these occasions. It does not appear that they lived in this village or made any celebration on those dates." They do not say from whom they learnt or had this information and it does not appear that they enquired of anybody in the presence of the plaintiff. Taking evidence in the absence of the plaintiff is illegal. Another objection urged by Mr. Ramaswami Aiyar is that his client wanted the arbitrators to take evidence and went to them on several occasions and they put him off with some excuse or other. The District Munsif does not deal specifically with this objection, but the respondent's vakil wants to rely upon the last paragraph of his judgment in which he says: "The arbitrators have arrived at their decision after due and careful and *bona fide* enquiry and there is nothing to vitiate the award." This does not amount to a finding that the statement of the plaintiff that he asked the arbitrators several times to take evidence on his side and they put him off with some excuse or other, is not true. On the whole, I am not satisfied that the arbitrators acted according to law, and therefore their award is bad. The District Munsif's order accepting the award is set aside and he is directed to restore the suit to file and dispose of it according to law. The costs of this petition will be provided for in the decree which may be passed by the District Munsif.

A. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS.

Nagalla Kotayya ... *Appellant in both the Second Appeals* (Plaintiff)*

v.

Koganti Kotappa and others ... *Respondents in S. A. Nos.* 1609 *and* 1610 *of* 1922 *(Defendants).*

Kotayya v. Kotappa.

Limitation Act, Art. 132—Applicability—Co-sharers in occupancy right in land—Payment of rent by one of—Contribution suit by him against other co-sharers—Maintainability—Limitation—Madras Estates Land Act, S. 5—Contract Act, S. 69.

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* S A Nos. 1609 and 1610 of 1922. 2nd February, 1925.

Kotayya v. Kotappa.

S. 5 of the Madras Estates Land Act clearly makes rent a charge upon the land. There is no distinction between the charge given under S. 5 of that Act and the charge given by S. 2 of the Madras Revenue Recovery Act. Assuming that the charge under S. 5 of the Madras Estates Land Act is not a charge within the meaning of S. 100 of the Transfer of Property Act, it does not follow that it is not a charge within the meaning of Art. 132 of the Limitation Act.

The plaintiff held the patta for the suit land and took in with him four *lopayakari* tenants, and in 1908, it was finally decided that they all had occupancy right in the land. Subsequently the plaintiff paid the whole of the rent and instituted a suit, more than three years after and within twelve years of the payment, to recover a portion of the rent from one of the other co-sharers. It appeared that all the sharers had pattas and were all personally liable to pay the rent.

Held, that the plaintiff had a right under S. 69 of the Contract Act to ask for contribution; that the rent was under S. 5 of the Estates Land Act a charge upon the land; and that the suit was a suit to enforce a charge within the meaning of Art. 132 of the Limitation Act and was not barred.

Second Appeal against the decree of the District Court of Kistna in A. S. Nos. 126 and 127 of 1921, and 140 and 143 of 1921, preferred against the decrees of the Court of the Additional District Munsif of Gudivada in O. S. Nos. 475 and 476 of 1920.

V. Ramadas for appellant.

P. Somasundaram for respondents.

The Court delivered the following

JUDGMENT :—The plaintiff held the patta for the suit land and took in with him four *lopayakari* tenants, but, in 1908, a dispute arose between them as to who was entitled to the occupancy right in the lands, and it was finally decided that they all had occupancy right in the land. Subsequently, the plaintiff paid the whole of the rent and now seeks to recover a portion of the amount from the other co-sharers. In the present case we are only concerned with one of these sharers. The plaintiff relies on the ruling of the Full Bench in *Rajah of Vizianagram* v. *Rajah Setruckerla Somasekhara Raz* (1), in which it was held that, where one of two or more co-sharers owning an estate subject to the payment of revenue to Government pays the whole revenue in order to save the estate, he is by the operation of law entitled to a charge upon the share of each of his co-sharers for the realisation of the latter's share of revenue and contends that, in consequence of this, his suit which is brought more than three years after the payment, is not barred by limitation as it is a suit to enforce a

1. (1903) I L R 26 M 686 at 696 : 13 M L J 83 (F B).

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charge and comes within the scope of Art. 132 of the Limitation Act. The District Judge has differentiated the present case from that, in that the present claim is one for rent under the Estates Land Act, holding that under the Estates Land Act rent is not a charge on the land. S. 5 of the Act, however, clearly makes rent a charge upon the land and it is difficult to see how the present case can be differentiated from the Full Bench decision which is concerned with the payment of revenue. There seems to be no distinction between the charge given under S. 5 of the Estates Land Act and the charge given by S. 2 of the Revenue Recovery Act. In both cases the charge is actually given in favour of the landlord, in the latter case, the Government, but there is none the less the charge upon the land in both cases. It would therefore appear that the Full Bench decision is applicable here and that the District Judge is wrong.

The respondent, however, relies on a case *Suramma* v. *Suryanarayana Jagapati Razu* (2), in which it was held that the charge under S. 5 of the Estates Land Act is not a charge within the meaning of S. 100 of the Transfer of Property Act. The correctness of the decision, to which I was a party, has been questioned in a subsequent case reported in *Sri Rajah Bollapragada Venkata Lakshmamma Garu* v. *Menda Seetayya* (3), but whether it is correct or not, the mere fact that the charge does not come within the meaning of S. 100 of the Transfer of Property Act does not necessarily imply that it is not a charge within the meaning of Art. 132, which is very general in its terms. I do not think that the decision in *Suramma* v. *Suryanarayana Jagapati Razu* (2) is any authority to the contrary.

Another argument is based on some of the remarks in *Sri Rajah Bollapragada Venkata Lakshmamma Garu* v. *Menda Seetayya* (3), namely that because it is S. 132 of the Estates Land Act which gives the Revenue Court power to apply the provisions of Chapter VI (of that Act) to the execution of a decree for arrears of rent, the same provisions are not applicable in the case of a Civil Court which must act under the Civil Procedure Code. No doubt these remarks in a way support the respondent's case, that the charge under S. 5 is limited in its application but they were made *obiter* and, if it was meant to lay down that a Civil Court cannot in any circumstances enforce

2. (1918) I L R 42 M 114 at 115 : 35 M L J 443
3. (1920) I L R 43 M 786 : 39 M L J 30

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the charge for rent given by S. 5 (of the Estates Land Act) with all respect, the remarks appear to me to go too far, for S. 132 relates only to a question of procedure and does not affect the substantive rights of the parties, the procedure to be adopted by the Revenue Court is that contained in Chap. VI of the Estates Land Act, whereas the procedure in execution by a Civil Court is that laid down by the Code of Civil Procedure, but whichever form of procedure is adopted, it cannot remove a charge which is given by law. In this view I think that the ruling in *Rajah of Vizianagram* v. *Rajah Setrucherla Somasekhara Raz* (1) must be held applicable to the present case and that, consequently, the plaintiff has a charge upon the land for the rent paid by him.

A further contention is put forward by the respondent that he is not liable for contribution under S. 69 (of the Contract Act) because the plaintiff alone was the person bound to pay the rent. It was held in *Jagapati Razu* v. *Sadrusannama Arad* (4) that the only person who is personally bound to pay revenue to the Government is the registered holder and that as the plaintiff was the pattadar, the other sharers were not personally bound to pay rent. This is a new argument put forward apparently for the first time in this Court and it would appear to be opposed to the facts, for it appears that the other co-sharers did actually obtain pattas in their own names for the landlord and, consequently, they would thus be liable to pay the rent under these pattas. Another case relied on is *Naraina Pai* v. *Appu* (5), but that, again, was a case of contribution in which the persons ought to be made liable was not the pattadar. In the present case, as all the parties had pattas, they were all personally liable to pay the rent. Consequently, the plaintiff has a right under S. 69 of the Contract Act to ask for contribution.

The appeals must accordingly be allowed, and there will be a decree for the recovery of the respondent's proportionate share of the rent with proportionate costs throughout, with the direction that, on failure to pay the amount, his share in the estate will be liable to be sold.

Time three months.

A. S. V. *Appeals allowed.*

1. (1903) I L R 26 M 686 : 13 M L J 83 (F B).
4. (1915) I L R 39 M 795 : 29 M L J 639.
5. (1914) 28 I C 456.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Kidangu Kettiya Ramdupurayil Kunhahomed ... *Appellant** (*4th Defendant*)

v.

Payoth Ramdupurayil Sara Umma and others ... *Respondents* (*Plaintiffs* 1 *to* 7 *and defendants* 2, 3 *and* 5).

Kunhahomed *v.* Sara Umma.

Malabar Law—Maintenance—Arrangement by karnavan for—Binding nature of, on his successors—Arrangement by karnavan allotting maintenance to existing and future members of a tavazhi—Suit by some of the members of the tavazhi claiming enhanced maintenance—Maintainability—Parties.

Some of the junior members of a Malabar tarwad filed a suit claiming maintenance from the karnavan. The latter contended that the plaintiffs were not entitled to maintain the suit without impleading the other members of the tarwad, or, at any rate, the other members of the plaintiffs' tavazhi, because in 1886 the then karnavan *K*, entered into a karar with the plaintiffs' ancestress under which certain properties were allotted to her and her family for maintenance. The recitals in the document showed clearly that it was an allotment for the maintenance of the said lady and her descendants, and it appeared that the plaintiffs had been obtaining the benefit of the allotment, at any rate, until shortly before suit.

Held, that the karar was on its true construction intended to enure for the benefit not only of the members then in existence but also of persons born subsequently, including the plaintiffs, that, though the plaintiffs might be entitled to enhanced maintenance, they could only obtain it by bringing a suit in proper form impleading all the necessary parties and putting the tarwad property in their hands at the disposal of the karnavan with a view to a re-allotment for maintenance, and that therefore the suit as brought was not maintainable.

An arrangement for maintenance made by a karnavan cannot be set aside by his successor except for good cause.

Second Appeal against the decree of the Court of the Subordinate Judge of Tellicherry in A. S. No. 170 of 1922 preferred against the decree of the Court of the Additional District Munsif of Tellicherry in O. S. No. 346 of 1920.

T. S. Viswanatha Aiyar for appellant.

B. Pocker for respondents.

The Court delivered the following

JUDGMENT :—In this suit the plaintiffs claim maintenance from the karnavan of their tarwad. Both the Lower Courts found in their favour and have given a decree for maintenance. The 4th defendant, who claims to be the present karnavan of the tarwad, has filed this appeal, and it is con-

*S. A. No. 1635 of 1923. 17th February, 1925.

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tended on his behalf that the plaintiffs are not entitled to bring this suit without impleading the other members of the tarwad, or at any rate the other members of their tavazhi, because in 1886 the then karnavan, Kunhi Thooppan, entered into karars with his six sisters, under which certain properties were allotted to them and their families for maintenance. The karar which refers to the tavazhi of plaintiffs' ancestress is filed as Ex. I. It is executed by the karnavan's sister, Kunjathumma and her nine children and also the children of these children. There are in all thirty-three executants who apparently comprise all the adult members of that tarwad. The minor children are not in terms parties to the karar and their parents do not purport to act as their guardians in the execution but the recitals in the document show clearly that it was an allotment for the maintenance of this lady, Kunjathumma, and her descendants. Both the Lower Courts have found that the karar was merely an allotment for the maintenance of the members of the tavazhi who were alive at its date. This would be a rather curious position in a Malabar tavazhi of this size because a large number of the members are adult women and it may be ordinarily expected that children would be born shortly after the date of the karar, and it is unreasonable to conclude that after-born children are intended to be deprived of the benefits of this karar unless it is so stated. It must be remembered that at the time when this karar was entered into there had been disputes and litigation in the tarwad and the allotments for the maintenance were made in settlement of those disputes, and therefore it is unlikely that the intention of those parties was that this settlement should be subject to modification immediately other members were born. Here, we have recitals in the document which show clearly that the allotment was made to the tavazhi as such which would include not only the members then alive but also members born thereafter. In paragraph 2 which recites " the properties set apart for ourselves and our children, etc.," altogether sixty-nine in number " now and others, " the force of that word " now " seems to be that it contemplates a different number being in existence hereafter and that the words " and others " can only refer to children coming into existence thereafter. It obviously does not refer to strangers and it cannot refer to people in existence for they are said to be only sixty-nine in number. I think it is perfectly clear from the recital and from the various references to "tavazhis" that the allotment was one

made to the tavazhi, including future members. The clause relied on by the Lower Court is a statement in paragraph 5 that the "stipulations according to this karar shall hold good until your death," but there is a subsequent provision that after the karnavan's death, it was open to the tavazhis to demand increased maintenance if circumstances justified it, and it would be open to all the parties to these karars to take advantage of that condition and apply for enhanced maintenance if it was justifiable, although possibly they would have that right even without a special stipulation. The Lower Appellate Court has held that the karar was to be good only during the lifetime of Kunhi Thooppan and relies on a so-called admission of the deceased first defendant who was karnavan that the karar was not binding on the karnavans who are to succeed Kunhi Thooppan. It appears that the first defendant is a member of the plaintiffs' tavazhi and this statement of his is not one against his interest but it is one in his favour. I do not think in view of the written statement that he has filed which directly contradicts this admission, that much importance can be attached to it. It is not denied that after Kunhi Thooppan's death the members of the plaintiffs' tavazhi have remained in possession of the properties allotted to them in 1886, and we see from the judgment Ex. VIII that the karars entered into at the time of Ex. I continued in force after Kunhi Thooppan's death. It has been held in this Court that an arrangement for maintenance made by a karnavan cannot be set aside by his successor except for good cause [see *Ramaswami Pattar* v. *Gopalan* (1)] and it is not suggested here that this maintenance allotment was not a proper one ; consequently it would be binding on Kunhi Thooppan's successors until set aside by a fresh arrangement. I have already found that the document is intended to enure for the benefit not only of the members then in existence but also of persons born subsequently and consequently plaintiffs as members of the tavazhi are entitled to the benefits of the allotment and it appears from the District Munsif's finding on Issue 11 that plaintiffs have been obtaining that benefit, at any rate, until shortly before suit. That being so, if plaintiffs want to set aside the arrangement they must implead the other members of the tarwad, or at least the other members of their tavazhi who are in possession of tarwad properties in lieu of maintenance and claim enhanced maintenance if they think

1. (1916) 32 M L J 97.

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that the circumstances of their family warrant the claim but it is not open to them to have the benefit of an allotment for maintenance to their tavazhi and seek to add to it a separate allotment for each individual ignoring the benefits of which they are already receiving. The cases relied on by the plaintiffs are *Kelu Achan* v. *Lakshmi Nethyar Ammal* (2) and *Pattu Neithiar* v. *Thazatha Meladath Dharman Achan* (3). In the former case it was held that a certain maintenance allotment which had not been fully acted upon was liable to alteration in view of altered circumstances. In the latter case, there was an allotment made to a tavazhi consisting of a certain number of persons and the maintenance was fixed at so much per head, it was there held that this was an allotment solely to the members then in existence and had no reference whatever to members who would be subsequently born. This was clear from the terms of the karar, and consequently it was held that other members of the tavazhi were entitled to separate maintenance. The facts of those cases are not identical in any way with the present case, and I hold that the plaintiffs are not entitled to bring this suit in this present form. They may be entitled to enhanced maintenance but in order to obtain it they must bring a suit in proper form impleading all the necessary parties and put the tarwad property in their hands at the disposal of the karnavan with a view to a reallotment for maintenance. The suit accordingly fails and is dismissed. Plaintiffs will pay appellant's costs of this appeal. Each party to bear his own costs in the Lower Courts.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice.* AND MR. JUSTICE KRISHNAN.

The Commissioner of Income-tax, Madras ... *Referring Officer**

v.

P. A. P. M. T. K. Thillai Chidambaram Nadan ... *Assessee.*

The Commissioner of Income-tax, Madras v. Chidambaram Nadan.

Income-tax Act, 1922, Ss. 23 (2), 63 (2)—Firm unregistered—Notice under S. 23 (2) to be served on—Mode of—Service on any member of the firm or service on the partner who made the return.

In the case of an unregistered firm a notice under S. 23 (2) of the Income-tax Act can be served on any member of the firm as provided for in S. 63 (2)

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*R C No 19 of 1924. 5th February, 1925.

2. (1913) 18 I C 234. 3. (1913) 21 I C 755.

of the Act. It is not necessary that notice should be served only on the member of the firm who made the return.

The word "person" clearly includes a firm as provided by the General Clauses Act, 1897; and when the return is made on behalf of the firm by a partner, it is the firm that is the person who makes the return and any proper service on the firm as authorised by S. 63 (2) will be a proper service.

The Commissioner of Income-tax, Madras v. Chidambaram Nadan.

Case stated under S. 66 (2) of the Income-tax Act, 1922 (Act XI of 1922), referring for the decision of the High Court the question of law, viz., "Whether in the case of an unregistered firm a notice under S. 23 (2) should be served only on the member of the firm who made the return under S. 22 (2) or whether under S. 63 (2) of the Indian Income-tax Act (Act XI of 1922) it can be served upon any member of the firm."

M. Patanjali Sastri for Referring Officer.

F. S. Vaz for assessee.

The Court delivered the following

JUDGMENTS :—*The Chief Justice* :—It is with the greatest difficulty that I could extract a question of law of any sort in this case; but, if there is any, I suppose it is this, as to whether under S. 23 (2) of the Income-tax Act 'the person who made the return' in the case of a firm means the identical person who made the original return. Common sense would indicate that the only requisite is that the firm who made the return should, as a firm, have the notice properly delivered to them. That is a matter of general law and it is obviously a question of fact in most cases whether the notice was such as to reach the legal entity known as the firm. Here it was addressed to one of the partners and by the ordinary law and the specific provision of S. 63 (2) of this very Act each partner is an agent for all the others in the firm. The question must be answered in this way: the assessee must pay the costs of this reference, Rs. 150 (Rupees One hundred and fifty). Coutts Trotter, C. J.

Krishnan, J. :—I agree to the answer proposed by the learned Chief Justice. The question put to us by the referring authority is whether in the case of an unregistered firm a notice under S. 23 (2) of the Income-tax Act should be served only on the member of the firm who made the return or whether under S. 63 (2) of the Act it can be served on any member of the firm. There can be no doubt about the answer, and it must be in the affirmative. Notice can be served on any member as provided for in S. 63 (2) and such service is Krishnan, J.

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good service. The word 'person' as pointed out by the Referring Officer, clearly includes a firm as provided by the General Clauses Act, 1897 ; and when the return is made on behalf of the firm by a partner, it is the firm that is the person who makes the return and any proper service on the firm as authorised by S. 63 (2) will be a proper service.

I agree to the order proposed as to costs.

A. S. V. *Question answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER.

Chakiri Subbayya and others ... *Petitioners** (*Defendants*)

v.

Lade Sreenivasa Rao ... *Respondent in all the petitions.* (*Plaintiff*).

Subbayya v. Sreenivasa Rao.

Madras Estates Land Act, S. 3 (2) (d)—Estate—Landholder—Shrotriemdar—If and when a "landholder" within the meaning of Act—Shrotriem if and when an "estate."

Under the Madras Estates Land Act not all Shrotriemdars and Inamdars are landholders, but only those who at the time of the grant did not own the *kudivaram*, in other words, the share of a tenant with a right of occupancy. Where, in a suit by a Shrotriemdar to recover arrears of rent instituted in a Munsif's Court, the plea of no jurisdiction is raised by the tenant, what has to be decided is whether at the time of the grant, under which the plaintiff claims, he had not the *kudivaram* right also. The fact that at the date of suit he had only the *melvaram* right does not matter. If the Shrotriemdar was originally the *kudivaramdar* and the *melvaram* also was granted to him, but he divested himself of the *kudivaram* right, the village is not an estate, for on a proper consideration of S. 3 (2) (*d*) of the Act, the words "to a person not owning the *kudivaram* thereof" evidently refer to the time when the inam was granted.

Petitions under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Madanapalle, dated 25th June, 1923, in S. C. S. Nos. 721, 876, 878 and 879 of 1920.

V. C. Seshachariar for petitioners.

N. S. Rangaswami Aiyangar and *K. R. Narayanaswami Aiyar* for respondent.

The Court delivered the following

JUDGMENTS :—These Civil Revision Petitions raise a question of jurisdiction. The connected suits were brought by the Shrotriemdar to recover rent for Faslis 1327, 1328 and 1329 and were filed in the District Munsif's Court of Madana-

*C R P Nos. 98 to 101 of 1924. 17th February, 1925.

palle. The defendants, who are the petitioners in the High Court, contend that these suits, being suits brought by a landholder of an estate to recover arrears of rent, are exclusively cognizable by a Revenue Court.

Under Act VIII of 1865, S. 1, Shrotriemdars fell under the category of 'landholders' and could proceed against their tenants before the Collector for recovery of rent, provided that they had taken written leases or muchilikas from them, but they might themselves be the tenants of a superior landlord [vide *Rama* v. *Venkatachalam* (1) and *Suryanarayana* v. *Appa Rao* (2)]. Under S. 87 suits for arrears of rent could also be instituted in Civil Courts.

Under Act 1 of 1908 not all Shrotriemdars and Inamdars are landholders, but only those who at the time of the grant did not own the *kudivaram*, in other words, the share of a tenant with a right of occupancy. Under S. 189 the jurisdiction of Civil Courts to try suits by landholders to recover arrears of rent is taken away.

After this Court's order of remand the District Munsif has now found on reconsideration that the suits are cognizable by his Court and he has granted decrees to the plaintiff. In revision the question of jurisdiction of the Civil Court is again mooted in this Court. The District Munsif found upon such evidence as the parties produced before him that the original grant was not shown to be a grant of the *melvaram* only. He should have added "to a person not owning the *kudivaram*." I am not satisfied, after hearing arguments, that this finding which is a mixed one of law and fact is wrong and should not stand.

The plaintiff has acquired by purchase the rights of certain *vrittidars* or sharers in the village of Shrotriem Chinnarao Kottappalli *alias* Mahal. The original grant, which was made 400 or 500 years ago, is not available. But we know from Ex. G that at the time of the inam settlement in 1865 the village was divided into 30 *vrittis* and was then under the management of Government, that under the grant half of the revenue went to the Shrotriemdars and the other half to the Government, that the *vrittidars* were in possession of their *vrittis* or shares, and that there was then no cultivable waste land but that much of the land had been encroached upon by the river and covered with tombs of Mahomedans. The plaint speaks of "cultivating tenants" and the

1. (1885) I L R 8 M 576.
2. (1892) I L R 16 M 40 : 2 M L J 249.

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written statement alleges that the Shrotriemdars sold away their lands long ago and gave possession to the ryots. Exs. D, BB, CC and DD are specimens of such sale deeds. The plaintiff's sale deed (Ex. C) mentions that the land was in the vendor's possession and enjoyment with independent rights. It may be that at the present time the Shrotriemdars have only the melvaram right, but for the purpose of jurisdiction it has to be decided whether at the time of the grant they had not the kudivaram right also. In the words of the Judicial Committee in *Suryanarayana* v. *Potanna* (3) is it "proved or is there any evidence to suggest that at the time of the grant there were any tenants in the village holding lands with any right of occupancy by custom or otherwise?" The evidence rather suggests that originally the Shrotriemdars or *vrittidars* were themselves in possession with powers of alienation which they were exercising. At any rate it may be confidently said that it has not been shown in this case that the *kudivaram* interest was at the time of the grant in the hands of some one else than the donees. If the Shrotriemdars were originally the *kudivaramdars* and the *melvaram* also was granted to them, but they divested themselves of the *kudivaram* right, the village is not an estate, for on a proper construction of S. 3 (2) (*d*) the words "to a person not owning the *kudivaram* thereof" evidently refer to the time when the inam was granted (*cf*. page 52 of Mr. V. Ramadas' commentary on this Act).

The District Munsif therefore had jurisdiction to try these suits. The Civil Revision Petitions are dismissed with costs.

A. S. V. *C. R. Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

Siva Subramania Pillai (died) and another ... *Appellants** (*Respondent and his L. R.*)

v.

Piramu Ammal ... *Respondent* (*Petitioner.*)

Siva Subramania Pillai v. Piramu Ammal.

*Hindu Law—Widow—Surrender by—*Bona fides of*—Proof—Quantum—Test.*

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*A A O No. 396 of 1922. 17th February, 1925.

3. (1918) I L R 41 M 1012 at 1020: 36 M L J 585 (P C).

The mere fact that some provision is made for the benefit of the surrenderer does not render a surrender by a Hindu widow invalid. If the transaction is a device to divide the estate with the reversioner the surrender is clearly not *bona fide;* but the converse is not necessarily true, for want of good faith may be evidenced by other circumstances.

S, a Hindu daughter, who had inherited the estate of her father and who was about 75 years old, her son (the appellant), who was only about 55, and her daughter, were living together as members of one family. *S* executed a surrender in favour of the appellant. As a part of the arrangement the appellant undertook to pay and did pay his sister a sum of Rs. 4,000. There was nothing to show that the appellant exercised any act of exclusive ownership from which unequivocal enjoyment or possession could be inferred. On the other hand, it appeared that, in entering into the transaction, *S* was more anxious that her daughter should be provided for than that her son should take immediate possession of the estate and that she entered into the transaction because she was fairly certain that on her death the appellant would not carry out her wishes. It further appeared that compensation money was paid by the Government into Court, and that the transaction was resorted to with a view to enable the parties to get at the corpus.

Held that, on the above facts, the District Judge was justified in coming to the conclusion that the surrender was not *bona fide* and was therefore not valid.

Appeal against the order of the District Court of Tinnevelly in I. A. No. 441 of 1919 in Compensation Reference No. 15 of 1915.

T. L. Venkatarama Aiyar and *R. Krishnaswami Aiyangar* for appellants.

P. V. Krishnaswami for respondent.

The Court delivered the following

JUDGMENT :—The Bench which heard C. M. A. No. 322 of 1919 decided that the surrender by Subbammal in favour of the appellant, if *bona fide,* would have the effect of divesting the respondent of her right to the property. Having taken this view of the law (we are not at present concerned with deciding whether this view is correct or not), the learned Judges remanded the case for the further question being determined whether the surrender was *bona fide* or not. The District Judge who has heard the case has recorded a finding that the surrender was not *bona fide.* The finding is attacked before us in this appeal.

The effect of the learned Judge's judgment is this. Subbammal executed a surrender in favour of the appellant who was her son. As a part of the arrangement the appellant undertook to pay and did pay his sister, that is, Subbammal's daughter Arumugatammal, a sum of Rs. 4,000. The District Judge, mainly from this fact, concludes that the surrender was

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not in good faith. To use his own words, "Legally this amounts to a partition of the estate between the surrenderer and surrenderee."

The first question to determine in this appeal is :—Does the surrender become inoperative by reason of the fact that a provision in favour of Subbammal's daughter was made? If nothing further appeared than that a sum of Rs. 4,000 was paid to Arumugatammal, we would not be disposed to hold that the surrender is not valid. It is now authoritatively settled that the mere fact that some provision is made for the benefit of the surrenderer does not render the surrender invalid. See *Angamuthu Chetti* v. *Varadarajulu Chetti* (1), *Bhagwat Koer* v. *Dhanukdhari Prasad Singh* (2) and *Sureshwar Misser* v. *Maheshrani Misrain* (3). In this connection it is necessary to observe that the case put forward by the appellant was not that in fact Rs. 4,000 was paid to his sister as a part of the arrangement and that that payment would not render the settlement bad, but, on the contrary, he wished to maintain that a debt having been due to the lady, it was discharged by payment of Rs. 4,000 at the time of the surrender. This contention is palpably false and we do not think it is necessary to add to the reasons that have been given by the District Judge in support of his finding. The evidence of Draviyam Pillai, as has been observed by the learned Judge, is utterly unreliable and we cannot act upon it. The very fact that this false contention was put forward indicates to some extent that the appellant did not regard the surrender as a *bona fide* surrender ; for his desire to conceal the true facts must in part be due to his conviction that the transaction was not above board. What then are the circumstances which induce us to take the view that the surrender is not *bona fide*? Before dealing with this question, we shall just refer to a passage in the judgment of the Judicial Committee in *Bhagwat Koer* v. *Dhanukdhari Prasad Singh* (2) already referred to. This is how their Lordships state the law :—

"This voluntary self-effacement is sometimes referred to as a surrender, sometimes as a relinquishment or abandonment of her rights ; and it may be effected by any process having that effect, provided that there is a *bona fide* and total renunciation of the widow's right to hold the property."

1. (1919) I L R 42 M 854 . 37 M L J 384 (F B).
2. (1919) I L R 47 C 466 : 37 M L J 513 (P. C.).
3. (1920) I L R 48 C 100 : 39 M L J 161 (P C).

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The ultimate question, therefore, to be decided in each case is, was the surrender *bona fide* or was it not? But great stress was laid by the appellant's learned vakil upon another passage in another judgment of the Judicial Committee in *Rangaswami Goundan* v. *Nachiappa Goundan* (4). That passage runs thus :—

"But the surrender must be a *bona fide* surrender, not a device to divide the estate with the reversioner."

It is contended that if the Court is satisfied that the transaction is not a device to divide the estate with the reversioner, it necessarily follows that the surrender is a *bona fide* surrender. We cannot agree with this contention. If the transaction is a device to divide the estate the surrender is clearly not *bona fide*; but the converse is not necessarily true, for want of good faith may be evidenced by other circumstances. Having made these observations, let us now examine the facts of the case in order to ascertain whether the surrender was *bona fide* or was not. At the date of this transaction Subbammal was about 75 years old, whereas the age of the appellant was only about 55. Subbammal, her son and her daughter were then living together as members of one family. Subsequent to the surrender, it does not appear that the appellant exercised any act of exclusive ownership from which unequivocal enjoyment or possession can be inferred. Subbammal was very old and in the ordinary course on her death the appellant would take the property. This event has since actually happened. What necessity was there for this surrender to come into existence? Subbammal was more anxious that her daughter should be provided for than that her son should take immediate possession of the estate and it was fairly certain that on her death the appellant would not carry out her wishes. It was not her intention that she should forthwith divest herself of the estate or that the surrenderee should enter into possession. There is still another circumstance. The compensation money was paid by the Government into Court, and on the 1st of May, 1919, the respondent claimed that money. To defeat her right to that amount and to get immediate possession of the corpus—these objects could be achieved by a surrender. A deed was accordingly executed on the 23rd of May, 1919 : and it was followed by an application by the appellant, dated 15th July, 1919, for the payment

4. (1918) I L R 42 Mad. 525 : 36 M L J 493 (P C).

Siva Subramania Pillai v. Piramu Ammal.

of this money. We are prepared to draw from these circumstances the inference that the surrender was not *bona fide*. On the whole, we think the District Judge has come to a correct conclusion and we affirm his judgment and dismiss the appeal with costs.

A. S. V. *Appeal dismissed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Lahore.)

PRESENT:—LORD SUMNER, LORD CARSON, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

Lala Tulsi Ram ... *Appellant**

v.

Ram Saran Das ... *Respondent.*

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Lala Tulsi Ram v. Ram Saran Das.

Onus of proof—Promissory note—Suit upon—Onus on plaintiff in—Original note filed with plaint into Court, but lost while in Court before trial—Onus in case of—Secondary evidence of contents of note—Admissibility—Conditions—Negotiable Instruments Act, S. 87—Pro-note—Material alteration in—Interpolation of words "with interest" if and when a.

In a suit upon a promissory note the question was whether the plaintiff had discharged the onus of proving that the original note had been lost without his default, so as to entitle him to give secondary evidence of its contents.

According to the practice, the original note had itself been attached to the plaint. By the time the suit came on for trial the original had been abstracted, and, though it could not be ascertained who was responsible for its abstraction, it was definitely found that neither the plaintiff and his vakil nor the defendant himself and his vakil were responsible for it. The Trial Judge allowed to be put in, as secondary evidence of the note, a photograph of it taken some little time before, and passed a decree in plaintiff's favour.

Held, that secondary evidence of the contents of the note had rightly been admitted by the Trial Judge.

As the original document was placed in the custody of the law, the onus of proof did not require the plaintiff to show how it was afterwards made away with, or to satisfy the Court that the defendant was more likely to have been guilty than himself. His denial of any participation in the act, if believed, was enough.

The promissory note contained originally provision for interest, and the interpolation of the words "with interest" would not, within the provisions of S. 87 of the Negotiable Instruments Act, amount to a material alteration avoiding the note, for it was intended that interest should be paid and the rate was sufficiently expressed already.

Appeal from a judgment and decree of the High Court (20th April, 1922) reversing a judgment and decree of the

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*P C Appeal No. 155 of 1923. 2nd December, 1924.

Senior Subordinate Judge of Delhi (7th January, 1918), decreeing the plaintiff's claim for Rs. 8,000 with interest thereon at 12 per cent. per annum up to the date of the plaint, and 6 per cent. per annum thereafter up to the date of payment, and costs.

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Lala Tulsi Ram v. Ram Saran Das

The facts appear sufficiently from the judgment of their Lordships.

Sir G. Lowndes, K. C. and *B. Dube* for appellant.

Sir W. Finlay, K. C. and *A. de Mello* for respondent.

2nd December, 1924. The Judgment of the Board was delivered by

Lord Sumner.

LORD SUMNER :—The appellant sued upon a promissory note made by the respondent and he lost in the High Court the decree, which he had recovered at the trial. Curiously enough the main question is, whether he discharged the onus of proving that the note had been lost without his default, so as to entitle him to give secondary evidence of its contents.

According to the practice, either the original note or a copy of it had to be attached to the plaint. It was stated, both in the plaint and in the list of documents accompanying it, that the note exhibited was the original. This was on 14th February, 1917. Next day the plaintiff's pleader received notice from the Court officials, that he must amend his list and pay a further process fee. He went to the office to make these defects good and, apparently, had access at least to the list of documents, if not to the other papers. Thereafter the officials, probably on the same day, served the defendant with the plaint and so gave him the opportunity of learning that the original document had been filed in Court, but what action he took thereon, if any, is matter of conjecture.

On the 1st March, 1917, an application by the plaintiff for attachment before judgment came before the District Judge. The defendant's pleader looked at the file and was heard by the plaintiff's pleader to say that the note was forged. On this the plaintiff's pleader also looked at the file, and at once applied to the Judge, saying that the original note had been abstracted and a false one substituted and asking him to hold an inquiry into the circumstances of this change. The District Judge then examined sundry officials, but the result was negative, for they did not incriminate either themselves or one another. When the trial came on the plaintiff's pleader asked to be allowed to put in, as secondary evidence of the note, a

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Lord Sumner.

photograph of it taken some little time before, and, as his statement was accepted that he filed the original with the plaint and had nothing to do with the substitution, the photograph was let in. Witnesses were then called on both sides. The defendant did not deny that he had made a note for the alleged amount, Rs. 8,000, but he said that it contained no provision for interest. The photograph concluded with the words "with interest @ Rs. 5 p. c. p. m." The words "with interest" appear from the photograph to have been written by the same hand as the rest of the body of the note, but at a later time and in part of the space originally left for the stamp and the signature, and the letters "@ Rs. 5 p. c. p. m." seem to have been written at the same time as the body of the note and by the same hand *currente calamo*. In the event the Trial Judge found for the genuineness of the note as shown in the photograph and gave a decree for the amount of the principal, but reduced the interest from the exorbitant rate of 60 per cent. to a mere 6 per cent. per annum.

The High Court held on appeal that the plaintiff had failed to prove the actual attachment of the original note of the plaint, when it was filed. If so, the evidence given by his pleader was false, and false almost certainly to his knowledge, and the plaintiff neither showed that, owing to its loss or otherwise, he was unable to produce it for a reason not arising from default or neglect on his part, nor indeed that it was lost at all. [Evidence Act, 1872, S. 65 (*c*).] Accordingly, as the claim on the note could not succeed without either the note itself or secondary evidence of its contents (S. 91), and no alternative cause of action was pleaded or relied on, the suit necessarily failed.

Their Lordships are unable to adopt this conclusion. The plaintiff's pleader gave positive evidence that he attached the note itself to the plaint, and that it was subsequently abstracted, and there was no direct evidence to the contrary. Mistake on his part was unlikely, for he was a young man, just beginning practice and anything but busy, and he acted as his own clerk. To have stated twice over in the documents filed that the original note was exhibited, and then to have exhibited a document, which bore no resemblance to the original as shown in the photograph, and was not even an exact copy of its wording, was wantonly and without reason to pre-

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pare for himself difficulties at the trial. The Trial Judge was critical of this pleader's evidence and in some respects descredited it, but this statement at any rate he accepted and their Lordships think that, so far, his view should prevail. How, when and at whose hands the subsequent substitution took place is matter of surmise only. If the statement of Neki Ram, a temporary clerk in the Court offices, can be accepted, he numbered the substituted document with the serial number, which it was found, when produced, to bear on February 22nd or 23rd. This at any rate narrows down the time of the change to the period between 16th February and 22nd February, but that is all that is known. It may be taken as certain that the change was made with criminal intent, and it is almost certain that some one in the Court offices was privy to it, if he were not the actual perpetrator at the instigation of the guilty litigant, but, even if that guilty litigant were the plaintiff, the original exhibition of the note itself must be taken to have been proved.

It has next to be considered whether the onus of proving loss in the Court offices, without default on the plaintiff's part (for here neglect obviously does not arise) was properly discharged. There is no positive evidence at all against the plaintiff's pleader, who, if any one on the plaintiff's side, would appear to be the guilty party, except that on 16th February he had the opportunity of manipulating the documents, if the whole of those lodged the day before were, as is most likely, handed to him then but even so he could not have made the change without some official's connivance and, if he was minded to do so, he could not have failed to see that honesty would be the better policy. The changeling could deceive no one ; it challenged suspicion and was certain to recoil upon himself.

On the other hand, there is even less ground for implicating the defendant's pleader. His statement to the Court, which was in no way shaken, was that he called the document a forgery as soon as he saw it, not because he knew that the disappearance of the original had already been brought about, but because the document exhibited mentioned interest and he knew from his client that none had been stipulated for. It was not shown that the defendant himself had meddled in the matter or visited the Court offices at all. The change took place and that is all that is known. Except that the motive was criminal and the plot equally tortuous and futile, their

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Lordships can form no opinion about what was actually done. As the original document was placed in the custody of the law, their Lordships do not think that the onus of proof required the plaintiff to show how it was afterwards made away with, or to satisfy the Court that the defendant was more likely to have been guilty than himself. His denial of any participation in the act, if believed, was enough.

From this the rest follows. Admissible evidence of the contents of the note was forthcoming. As photographed, it contained originally provision for interest, and the interpolation of the words "with interest" would not, within the provisions of the Indian Act, amount to a material alteration avoiding the note, for it was intended that interest should be paid and the rate was sufficiently expressed already (Negotiable Instruments Act, Section 87). Accordingly, their Lordships do not think themselves warranted in disturbing the conclusion of the learned Trial Judge. The advantage, which he enjoyed, of seeing the witness and noting his demeanour was greater in the case of the plaintiff's pleader than it is with many Indian witnesses, for the pleader was a professional man with University degrees, whose mind could be more certainly read by the learned Judge, than if the question had arisen with a mere ryot or a mahajan.

Their Lordships will accordingly humbly advise His Majesty that the judgment of the Trial Judge ought to be restored and the appeal allowed with costs here and below.

Solicitors for appellant : *T. L. Wilson and Co.*

Solicitor for respondent : *E. Dalgado.*

A. de M. *Appeal allowed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Fort William in Bengal.)

PRESENT :—LORD SUMNER, LORD PHILLIMORE, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

Surajmull Nagoremull ... *Appellants**

v.

The Triton Insurance Company, Limited ... *Respondents.*

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Surajmull Nagoremull v. The Triton Insurance Co., Ltd.

Stamp Act (II of 1899), S. 7—Contract for Sea Insurance—What amounts to—Validity—Writing—Formalities—Necessity—Plea of invalidity of contract on

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*P C Appeal No. 11 of 1924. 2nd December, 1924.

ground of its being in contravention of statute—Maintainability for first time before Privy Council—Respondent—Judgment of Court below—Right to support, on ground on which decision was based.

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The suit was for breach of an alleged contract to "issue policies of insurance covering war risks on goods" shipped or to be shipped by the plaintiffs "at the rate prevailing at the time of the plaintiff firm's declaration of the steamer, by which goods, as aforesaid, were to be shipped." This was founded on (*a*) a written quotation by the defendants of their lowest rate on jute per *S. S. Constantinos XII* at 1|2 per cent., and war risk at 5 per cent., less 10 per cent; (*b*) an acceptance of this rate by the plaintiffs; and (*c*) an arrangement that the plaintiffs should supply the defendant company with a statement of the approximate amount to be covered. The alleged contract arose on an acceptance by word of mouth of a letter quoting a rate of premium and on a declaration by word of mouth, not of the name of the steamer by which the goods were to be shipped, but of the expected value of the plaintiffs' goods to be loaded on board of her.

Held, that the contract alleged by the plaintiff was a contract for sea insurance and nothing else, and, not being expressed in a policy, was unenforceable under S. 7 of the Indian Stamp Act (II of 1899); that, as the enactment was prohibitory and as to allow a suit to proceed in defiance of S. 7 would defeat the provisions of the law laid down therein, the objection founded on the section should be entertained and given effect to in the appeal to the Privy Council, though it had not been raised in the written statement, and though it had not been raised or discussed in the Courts below; that the High Court on appeal was right in holding that the contract alleged by the plaintiff had not been sufficiently established; and that the defendants were entitled to have the judgment of the Board on the whole case and to have the appeal dismissed on the merits with costs, notwithstanding that the suit was liable to be dismissed on the new ground taken by them before their Lordships, viz., that the contract alleged was unenforceable under S. 7 of the Stamp Act.

Plea of disobedience to a statutory enactment when may and may not be raised for first time in appeal.

Appeal No. 11 of 1924 from a decree of the High Court in its Appellate Jurisdiction (Sanderson, C. J. and Richardson, J.), dated 18th April, 1923, reversing a decree of Pearson, J.

The facts appear from the judgment of the Board.

Stuart Bevans, K. C. and *Kenworthy Brown* for appellants.

Dunne, K. C. and *Du Pareq* for respondents.

2nd December, 1924. The Judgment of the Board was delivered by

Lord Sumner

LORD SUMNER:—The appellants, the plaintiffs below, brought their suit for breach of an alleged contract to "issue policies of insurance covering war risks on goods" shipped or to be shipped by them "at the rate prevailing at the time of the plaintiff firm's declaration of the steamer, by which goods,

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as aforesaid, were to be shipped" (Plaint para. 3). As developed in further paragraphs, this was founded on (*a*) a written quotation by the defendants of their lowest rate on jute per *Constantinos XII* at 1|2 per cent. and war risk at 5 per cent., less 10 per cent.; (*b*) an acceptance of this rate by the plaintiffs; and (*c*) an arrangement that the plaintiffs should supply the defendant company with a statement of the approximate amount to be covered. Ultimately there was a declaration for an aggregate amount of £10,870, for which sum the defendants refused to issue a policy, whereon the plaintiffs insured elsewhere at higher premiums and claimed the excess as their damages in the action. There was no loss of the goods at all.

Pearson, J. who tried the case, found the contract and breach proved and gave the plaintiffs decree, but the High Court, holding the contract to be insufficiently established, set that decree aside.

On being informed that the alleged contract arose on an acceptance by word of mouth of a letter quoting a rate of premium and on a declaration by word of mouth, not of the name of the steamer by which the goods were to be shipped, but of the expected value of the plaintiffs' goods to be loaded on board of her and that the breach alleged was the defendants' refusal to issue a policy, their Lordships, struck by the divergence in this case from ordinary underwriting practice as known in this country, and by the singularity of an enforceable contract by word of mouth to issue a policy of marine insurance, inquired whether there was no legislation in India corresponding to the Stamp Act, 1891 (54 and 55 Vic. c. 39), sect. 93 (1). Their attention was then drawn by counsel to the Indian Stamp Act (II of 1899), sect. 7 of which provides that (with exceptions not now material) "no contract for sea insurance shall be valid unless the same is expressed in a sea policy," a provision which re-enacted the original enactment of 1894.

This section had not been pleaded by the defendants in the suit, for their general plea, No. 10—"Lastly, the defendant company submits that the suit of the plaintiff firm is not maintainable"—cannot be read as raising a specific statutory answer. Their Lordships were informed that the point was not discussed in either Court below. Certainly it passed unnoticed in the judgments, although Richardson, J. says "the law has laid it down that agreements of certain kinds shall

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not be valid at all, unless commemorated in writing with or without formalities. . . . . . In India apparently it is not fatal to the plaintiffs' case that there was no contract in writing." Possibly the fact that the High Court's decision was already plainly adverse to the claim may be the explanation of the circumstance, that counsel did not there and then dispel a misapprehension in the learned Judge's mind of such capital importance, but the result, at any rate, has been that the effect of this section was not considered until the case came before their Lordships' Board.

The suggestion may be at once dismissed that it is too late now to raise the section as an answer to the claim. No Court can enforce as valid, that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a Court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset [*Nixon* v. *Albion Marine* (1).]. The enactment is prohibitory. It is not confined to affording a party a protection, of which he may avail himself or not as he pleases. It is not framed solely for the protection of the revenue and to be enforced solely at the instance of the revenue officials, nor is the prohibition limited to cases, for which a penalty is exigible. The expression of an agreement for sea insurance, otherwise than in a policy, is a thing forbidden in the public interest, and the statutory insistence on a policy is no mere collateral requirement or prescription of the proper way of making such an agreement. To allow the suit to proceed in defiance of S. 7 would defeat the provisions of the law laid down therein. In England this is well-settled law [*Fisher* v. *Liverpool Marine* (2), *Ionides* v. *Pacific Insurance Co.* (3) (Blackburn, J.), *Xenos* v. *Wickham* (4) (Willes, J.)], and there is no ground for construing the Indian Act, expressed in almost identical terms, in any different way. The observations of the High Court in the *Reference under the Stamp Act* (5), distinguishing a contract for sea insurance and a policy of sea insurance, seem to have been directed to another point, and the case of *Bhagwandas* v. *Netherlands Sea Insurance Co.* (6) was before the Stamp Act. In their Lordships' view, the contract alleged by the plaintiff was a

1. (1867) L R 2 Ex. 338.
2. (1874) L R 9 Q B 418.
3. (1871) L R 6 Q B at 685.
4. (1867) L R 2 H L at 314.
5. (1903) I L R 30 C 565.
6. (1883) 14 A C 83.

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contract for sea insurance and nothing else, and, not being expressed in a policy, was unenforceable.

The appellants asked that, in the event of the respondents succeeding upon this ground, they should not be allowed any costs, since the suit had proceeded throughout on the questions of fact in the case. For such a course there is authority [*Home Marine Insurance Co.* v. *Smith* (7)]. The respondents, however, had defended the claim on the merits and not on the failure to satisfy the statute, for obvious business reasons. They were entitled to have their Lordships' judgment on the whole of the case and to ask to have the appeal dismissed with costs, if they could support the judgment of the High Court, upon the grounds on which it was given. Their Lordships therefore proceed to examine the facts without restating them at length.

The transaction alleged rested on conversations, except for the one letter which quoted a rate of premium against war risk. There is always considerable difficulty when one of a number of mercantile transactions of a type usually recorded in writing has to be proved by word of mouth, for experience shows that in such cases the most honest and careful witnesses, recalling to memory only the result of the conversations, tend to give evidence of what they think they must have heard and said to produce such a result rather than to state from actual memory of them the very words that were used. This difficulty the appellants themselves deliberately increased, and for no good purpose, by postponing the issue of their writ and the prosecution of the suit in a wholly indefensible manner. It is familiar enough that in country cases all over India claimants intentionally defer the commencement of suits till they are all but time-barred—a practice so deeply rooted, that it is useless to protest against it—but it is with equal surprise and regret that their Lordships notice the extension of this evil practice to mercantile transactions in Calcutta. The conversations in question took place in November and December, 1916, and the cause of action, if any, was complete before the end of the year; nevertheless, the suit was not begun till the 8th December, 1919; the written statement was not delivered till the middle of 1921, and the case was only brought to trial on the 31st July and 1st August, 1922. This interval of five years and a half was not, however, allowed to dim the definiteness, with which the partners and employees in the plain-

7. (1898) 1 Q B 856.

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tiffs' firm spoke to conversations in the ordinary course of business, relating to a matter, which had little about it that was out of the common, yet it is on the extent to which these witnesses can be trusted that the success of their claim depends. Witnesses, who speak after such an interval, as a rule remember either too little or too much. Here it is excessive recollection that is the vice of the plaintiffs' case. The question being whether any contract of insurance relating to war risks ever was agreed at all, three separate witnesses swore to separate agreements upon the subject ; the first when a quotation for a war risks premium was first asked for and before it was given ; the second when it was given by word of mouth and before it was put into writing ; the third when, for the first time, something approaching a declaration that could give rise to a specific insurance was made to the defendants. It was this last agreement that was ultimately relied on.

The case was put thus. A letter containing a quotation of a war risks premium having been sent by the plaintiffs on the 30th November, the defendants' representative, without awaiting the receipt of a declaration of interest, called on the plaintiffs' senior partner at his private house to ask him "to let them know the approximate amount the insurance would be with regard to the goods of the steamer *Constantinos XII*, because they wanted to reinsure." The enquirer was referred to the office and there "after calculation a Babu handed over a figure in pounds." It was on a slip of paper containing an approximate number of bales and "the approximate amount" in pounds sterling. The amount given was £16,000, but it is impossible to say that this is a specification of "the amount or amounts insured." The plaintiffs produced a press copy of a letter of the same date, in which they purported to inform the defendants that they confirmed their war and marine declarations of that date, but neither Court below believed that this letter was genuine. When written declarations were subsequently made a few days later, the actual amounts were only £9,300 and £1,570. The quotation had meantime been withdrawn and the defendants refused to insure at the rate quoted on the 30th November, as they had since heard from London that current rates were now much higher, a point vital to the possibility of reinsuring the line. Accordingly, the earlier amount, approximately given, did not satisfy the statutory requirements of a sea-policy, and the latter amounts were not an acceptance of the rate of premium

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offered, for it had in the meantime been withdrawn. It was no longer a "subsisting proposal capable of being accepted," as in the case of *Bhagwandas* v. *Netherlands Sea Insurance Co.* (6).

It may be conceded that, in the ordinary course, the plaintiffs would wish to cover the war risk as well as the marine risk on their shipments. Possibly, the war risk cover would not be immediately pressing ; it might suffice, if it was effected before the ship cleared the Suez Canal, but, naturally, the covers would both be arranged before the ship sailed from Calcutta and most conveniently with the same insurers. Naturally, also, the plaintiffs would require policies in the ordinary way, that is, documents that could be attached to bills of exchange or transferred to purchasers by separate assignments. On the other hand, it is certain that the defendants' representative could not really have meant, whatever he might be careless enough to say, that he was willing to cover £16,000 or even £10,870 then and there, without knowing the current rate of premium on that day, since the line, which the defendant company could take on war risks, was strictly limited and any excess must be covered in Europe. It is, therefore, in the last degree improbable that the transaction alleged should have been completed without the issue of regular cover notes from the office, and the probability is that, the defendants having withdrawn from the negotiation in time, the plaintiffs' whole endeavour has been to hold them to a quotation which was out of date, and to make up for the absence of ordinary documents by an exaggerated account of quite unimportant inquiries. Their Lordships think that the learned Judges of the High Court were fully warranted in disbelieving the plaintiffs' case. They do not think it necessary to discuss the question whether the damages claimed could have been said to flow from a breach of the contract alleged, if it had been made and was enforceable, but they express no opinion in favour of that contention. They will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants : *Pugh and Co.*

Solicitors for respondents : *Sandersons* and *Orr Dignams.*

A. de M. *Appeal dismissed.*

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6. (1883) 14 A C 83.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Palani Goundan (dead) and others ... *Appellants* (3rd defendant and his legal representatives)*

v.

Suppia Goundan and others ... *Respondents (Defendants 1 and 2 and plaintiffs 1 to 4 and 6 to 8).*

Palani Goundan v. Suppia Goundan.

Res judicata—*Hindu Law—Reversioner presumptive—Suit for declaration of invalidity of mortgage by widow—Dismissal on ground that plaintiff was not reversionary heir as alleged by him—Suit by him for possession after death of widow on the ground that he had become actual reversioner—Maintainability.*

M, claiming to be the presumptive reversioner of the estate of one *R*, filed a suit for a declaration that a mortgage executed by *R's* widow was not binding upon the reversionary heirs. *R's* widow and the mortgagee, who were made parties to that suit, denied *M's* alleged relationship to *R* and the reversionary right claimed by him, and an issue was framed in the case on that point. After a witness was examined, *M* applied to be allowed to withdraw the suit with liberty. Permission to withdraw with liberty was refused, *M* declined to withdraw the suit without such permission, and the Court disposed of the suit on the merits against *M* on the ground that he had not proved that he was the reversionary heir as alleged by him. The decree dismissing the suit was affirmed on appeal.

In a suit brought by *M* after the death of *R's* widow for recovery of possession of the property comprised in the said mortgage, he claimed possession on the ground that he had become the actual reversioner in whom the estate had vested.

Held, that the question of the reversionary right of *M* had become *res judicata* by reason of the decision in the prior suit and that the fact that, in the order refusing permission to withdraw the prior suit with permission, the Munsif had stated that *M* would not be precluded from filing a suit for possession after the widow's death if permission to file a fresh suit for declaration was not granted did not prevent the rule of *res judicata* from applying.

Second appeal against the decree of the Court of the Subordinate Judge of Coimbatore in A. S. No. 1 of 1921 preferred against the decree of the Court of the District Munsif of Tiruppur in O. S. No. 267 of 1918.

T. V. Ramanatha Aiyar and *A. S. Srinivasa Aiyar* for appellants.

A. Venkatarayaliah and *L. Venkatanarasiah* for respondents.

The Court delivered the following

JUDGMENT :—The question to be decided in this appeal is, has the subject-matter of the action become *res judicata?*

*S A No. 1450 of 1922. 2nd February, 1925.

The plaintiffs derive their title from one Muthu Goundan, and the defendants from Palani Ammal, the widow of the last male holder. Muthu filed as a presumptive reversioner of the estate of one Raya Goundan O. S. No. 83 of 1908 for a declaration that a mortgage executed by Palani in favour of the 2nd defendant in that suit was not binding upon the reversionary heirs. Palani, who was the 1st defendant as also the mortgagee defendant, denied the relationship set up by the plaintiff. The first issue framed in the case raised the question whether Muthu was related in the manner alleged in the plaint and was the reversioner as claimed. After a witness was examined, Muthu, discovering that the pedigree on which he relied was wrong, applied to be allowed to withdraw the suit with permission to file a fresh suit. The Court refused the permission and the plaintiff having declined to withdraw the suit without such permission, the Court disposed of the case on the merits. The issue relating to Muthu being the reversionary heir was found against him and the suit was dismissed. Muthu then filed an appeal which was also dismissed. In the present suit Muthu alleges that he has become the actual reversioner in whom the estate has vested and possession is claimed on that footing. The matter really decided becomes apparent from the following passage of the judgment of the District Munsif in O. S. No. 83 of 1908 :—

"In the affidavit now filed by the plaintiffs in support of their petition for withdrawal of the suit with permission to sue again they admit that the pedigree given by them along with the plaint is not correct. Ex. I, the registration copy of sale deed executed by 1st plaintiff's father, shows that the 1st plaintiff's grandfather was not Perumal Goundan as given in the plaintiffs' pedigree but his name was Chinna Thirumalai Goundan. From Ex. II the division release deed between the plaintiffs 2 to 4 attested by 1st plaintiff, it is also clear that 1st plaintiff is not related to the other plaintiffs as he claims to be in the pedigree. The burden of proving the relationship to 1st defendant's husband and thus their reversionary right to his estate lies heavily on the plaintiffs and they have failed to discharge it. I find the first issue against the plaintiffs and, on that finding alone, dismiss the suit."

The Subordinate Judge, in appeal from the decision of the District Munsif, thus deals with the question :—

"Upon the evidence on the record the Lower Court has found that plaintiffs have failed to prove their reversionary right and I concur in its finding. The appeal is dismissed with costs."

The point, therefore, to be decided is, whether the question of the reversionary right of Muthu has become *res judicata*. This issue has been decided in favour of the plaintiff by the Lower Courts and the 3rd defendant appeals.

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It is now settled law that a suit by a reversioner during the life-time of the widow is a representative one and enures for the benefit of all the reversioners and is equally operative to the detriment of all. See *Venkatanarayana Pillai* v. *Subbammal* (1) and *Varamma* v. *Gopaladasayya* (2). The last case cited illustrates very forcibly this rule and gives full effect to the principle. The presumptive reversioner at the date of the alienation by failing to bring a suit within the twelve years allowed became barred under Art. 125 and his omission was held to preclude all reversioners including even subsequently born reversioners from questioning the alienation during the widow's lifetime although be it noted that subsequently born reversioners became on their birth nearer presumptive reversioners than the person whose omission led to this result.

There can thus be no doubt that a judgment obtained by the presumptive reversioner that an alienation is good is binding during the lifetime of the widow on the whole body of reversioners ; and conversely a decision obtained by the presumptive reversioner against the widow that an alienation is not binding is *res judicata* and cannot be questioned by the widow during her lifetime in any subsequent suit brought by any other reversioner.

The question then arises, does the death of the widow make any difference ? In *Kesho Pershad Singh* v. *Sheo Pragash Ojha* (3) the facts are, that the then presumptive reversioner filed a suit during the widow's lifetime and obtained a declaration that an alienation was not binding on the widow's death, she then died and succession opened to the plaintiff who was the actual reversionary heir and in his suit he was held entitled to take advantage of the previous decision and to rely upon it as *res judicata*.

Hussain Reddy v. *Venkata Reddy* (4) decided by Wallace and Jackson, JJ. is the converse of *Kesho Pershad Singh* v. *Sheo Pragash Ojha* (3). The previous suit in the lifetime of the widow by the presumptive reversioner was dismissed on the ground that the alienation was for a justifiable purpose. The second suit by the actual reversioner after the widow's death was held barred on the ground of *res judicata*. To the

1. (1915) I L R 38 M 406 : 28 M L J 535 (P C).
2. (1917) I L R 41 M 659 : 35 M L J 57 (F B).
3. (1924) 51 I A 381 : 47 M L J 824 (P C).
4. (1924) 47 M L J 545.

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same effect is my own judgment in S. A. No. 923 of 1921. In the suit against the widow by the presumptive reversioners, their right was found against on the ground that the last male holder had left a will. This judgment, I held, operated as *res judicata* precluding the actual reversioner from re-agitating the question after the death of the widow.

Sri Raja Rao Lakshmi Kantaiyammi v. *Sri Raja Inuganti Rajagopal Rao* (5) has also a very direct bearing on the issue to be decided. *S* filed a suit claiming as reversionary heir entitled to inherit after the death of the defendant, the mother of the last male owner. She defended that suit on the ground that the properties were her stridhanam and that her daughter and daughter's son were entitled to succeed to them after her. *S* died during the pendency of the suit and *R*, who alleged to be his adopted son, was substituted for him. The said daughter and the daughter's son were also made parties to the suit. A decree was passed declaring that certain alienations made by the mother were invalid against the reversionary heir. The mother having died after decree, *R* brought as the nearest reversioner a second suit against the daughter and the mother for possession of the property. The point to be decided was, whether the matter of the reversionary right became *res judicata*. Collins, C. J. and Parker, J. held that the contention of *res judicata* was well founded. They observed :—

"As the issue was tried by a Court of competent jurisdiction between the same parties litigating under the same title, we can see no reason why the question between them should not be *res judicata* under S. 13 ?" *See* bottom of page 346.

The Privy Council observing at page 350 that the question whether *R* was the nearest reversioner was distinctly raised in the earlier suit, confirmed the decree of the High Court and held that the previous decision was conclusive between the parties in the second suit. This ruling would be a direct authority but for the fact that in the present case the reversioner did not succeed in the first suit but lost it. But does this fact make any difference ? Hukum Chand points out that the test of *res judicata* is mutuality. He cites the observations of Petheram, C. J. in *Surendranath Pal Chowdhry* v. *Brojonath Pal Chowdhry* (6) and Muthuswami Aiyar in *Gnanambal* v. *Parvathi* (7) to the effect that estoppel is mutual,

5. (1898) I L R 21 M 344 (P C).
6. (1886) I L R 13 C 352 at 356 (F B).
7. (1892) I L R 15 M 477 : 2 M L J 212.

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that a particular judgment if obligatory upon either is binding upon both. He says that a party will not be concluded against his contention by a former judgment unless he could have used it as a protection, had the judgment been the other way. The result, therefore, is that the Privy Council having held in *Sri Raja Rao Lakshmi Kantaiyammi* v. *Sri Raja Inuganti Rajagopal Rao* (5) that a decision favourable to the reversioner could be used against the widow, the converse of the proposition is equally true that the widow who obtained a judgment in her favour could use it as a protection against the reversioner. As Mr. Justice Mahmood in *Jamait-un-nissa* v. *Lutf-un-nissa* (8) says :—

"A finding which conclusively binds one party must necessarily bind the opposite party also, and that but for this reciprocity, the rule of *res judicata* far from attaining its object of putting an end to litigation, would only achieve the contrary result of increasing litigation." [*See* Hukum Chand's *Res judicata*, 1894 Ed., p. 24. *See* also *Lilabati Misrain* v. *Chobey*, (1907) 6 Cal L J 621 at 627.]

In *Nawab* v. *Punjaba* (9) (Lahore) it was held, that in similar circumstances a second suit by a reversioner after the death of the widow was barred as *res judicata*.

Fateh Singh v. *Jagannath Baksh Singh* (10), a decision of the Judicial Committee, is almost conclusive against the respondent. Certain reversioners instituted a suit for cancellation as void of a deed of gift executed by the widow of the last male holder. Besides the widow and the alienee there were others who were impleaded as defendants, one of whom was Ganga Baksh. The plaintiffs admitted that they were remoter in relationship to the common ancestor than Ganga Baksh who being the nearest reversioner would ordinarily be the person entitled to question the alienation. The plaintiffs, however, based their right to sue upon Ganga Baksh's indifference to his rights and collusion with the widow and the alienee. During the pendency of the suit the widow died and the plaintiffs applied for permission to amend the plaint by adding a prayer for possession and by adding a new ground of claim, namely, that according to a custom alleged, the nearer as well as the remoter heirs both inherit the property according to the shares of their fathers *per stirpes*. The application for amendment was disallowed on the ground that

5. (1898) I L R 21 M 344 (P C). 8. (1885) I L R 7 A 606 at 619 (F B).
9. (1921) 59 I C 946.
10. (1924) I L R 47 A 158 : 48 M L J 64 (P C).

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it was material to allege the family custom in the suit even as originally laid and that the plaintiffs not having then alleged it ought not to be permitted to introduce this ground at a later stage. Thereupon the suit itself was disposed of and the material portion of the judgment is as follows :—

"I therefore order that the plaintiffs being one degree remoter to the last male holder than defendant No. 3 they have no cause of action. The suit must be, therefore, dismissed."

Some of the reversioners who instituted this suit instituted a second suit (the widow having as stated above died) against the alienees and the representatives of Ganga Baksh for possession of the property. One of the defence raised was that the subject-matter of the action was *res judicata.* The Courts in India held that the question became *res judicata* and the Judicial Committee upheld this view.

As an authority on the question involved in the present case, this decision is extremely valuable for the following reasons :—

1. The plaintiffs who brought the second action were identical with some of the plaintiffs who instituted the first suit. In this respect there is substantial agreement between the facts of this case and the one decided by the Judicial Committee.

2. The first suit was instituted during the lifetime of the widow, the second after her death. In the present case also, these facts exist.

3. If the plaintiffs, at the time of the first suit, had been the presumptive reversioners, they would have become, on the facts, upon the death of the widow, actual reversioners. In this respect also, there is no difference between the two cases.

Let us now see what their Lordships did. They construed the judgment in the earlier suit as amounting to a negation of the plaintiffs' reversionary rights. In the second suit they held that the question could not be again raised. I may reproduce their own words :—"They (the plaintiffs) claimed as next heirs and their claim was dismissed. They cannot fight it over again."

Their Lordships felt no difficulty by reason of the fact that the first suit was for declaration and the second suit was for possession. Nor did they refuse to apply the principle

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of *res judicata* on the ground that whereas the earlier suit was directed against the widow, the later one was filed after her death. What is even more significant is, that notwithstanding these facts, they gave full effect to the doctrine of *res judicata,* holding, as they did, that the case fell within Explanation IV of S. 11, Civil Procedure Code, which runs thus :—

"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

The plaintiffs in the previous suit ought to have alleged the family custom and not having alleged it, they were precluded from relying on that ground in the second action.

The respondent supports his contention that the matter has not become *res judicata,* by relying upon the following passage in the order of the District Munsif in the previous suit, the order referred to by me, by which permission to withdraw from the suit with liberty to file a fresh suit, was refused.

"After all this suit is only for a declaration and there is no hardship for the plaintiffs, if no permission to bring a fresh suit for decalration is granted, for they could after the widow's death bring a suit for possession, contesting also the present alienations."

I fail to see how these observations of the Munsif can prevent the rule of *res judicata* from applying. In *Fateh Singh* v. *Jagannath Baksh Singh* (10) already referred to, a similar contention was put forward by reason of the words "I leave them to the liberty of filing a fresh suit for possession" occurring in the previous judgment. But that contention was overruled by the Judicial Committee. The respondent also relies upon *Singa Reddi* v. *Subba Reddi* (11). The second suit for possession was held not barred under O. 23, R. 1 by reason of the first suit for declaration being withdrawn without liberty. This is clearly not an authority in favour of the respondent. O. 33, R. 1, cl. 3 says :—

"Where the plaintiff withdraws from a suit without the permission referred to in sub-rule (ii), he shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim."

The case referred to decided that the suit for possession cannot be considered as having been brought in respect of the same subject-matter as the earlier suit for declaration. In the present case this section is utterly inapplicable for the very simple reason that the plaintiff has not withdrawn from the

10. (1924) I L R 47 A 158 : 48 M L J 64 (P C).
11. (1915) I L R 39 M 987 : 31 M L J 48 (F B).

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suit without permission. It was open to the plaintiff to have adopted this course. But the case was allowed to be tried and judgment was delivered in due course.

I am clearly of the opinion that the subject-matter of the action has become *res judicata* and that the plaintiff's suit, therefore, fails. The second appeal is accordingly allowed and the suit is dismissed with costs throughout.

I must add that the appellant's vakil intimated to me that he is in a position to show that the judgment of the Lower Appellate Court cannot be sustained even in second appeal on the merits. As I have come to the conclusion that the plaintiff must fail on the ground of *res judicata* I have not heard arguments on the other questions.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

Made Gouda (dead) and others ... *Appellants** (*1st defendant and his L. Rs.*),

v.

Chenne Gouda and others ... *Respondents* (*Plaintiff and 2nd defendant and party-Respondent*).

Made Gouda v. Chenne Gouda.

Hindu Law—Joint family—Partition—Stranger to family—Allotment of immoveable property to, as sharer—Validity—Registered instrument—Necessity.

At a partition between the members of a joint Hindu family consisting of a father and his sons they purported to include the 2nd defendant, who was admittedly, not a member of the joint family, and to allot to him a proportionate share of the joint properties. There was, however, no registered instrument, though the property allotted to the 2nd defendant was over Rs. 100 in value. *Held* that, whether the transaction was a gift or an exchange, it offended against the provisions of the Transfer of Property Act, and that the 2nd defendant therefore acquired no title to the property allotted to him.

A person cannot, by the mere recognition of another as his co-sharer, convey title to him of immoveable property without observing any of the formalities required by law for it.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Coimbatore in A. S. No. 10 of 1921 preferred against the decree of the Court of the District Munsif of Kollegal in O. S. No. 88 of 1919.

C. V. Anantakrishna Aiyar and *P. S. Narayanaswami Aiyar* for appellants.

K. Bhashyam Aiyangar for *S. Muthiah Mudaliar* for respondents.

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*S. A. No. 241 of 1922. 3rd February, 1925.

Made Gonda v. Chenne Gonda.

The Court delivered the following

JUDGMENT :—In this case the plaintiff is the grandson of the 1st defendant. The latter is the appellant and is the uncle of the 2nd defendant who is his sister's son. The 1st defendant and his sons entered into a partition in the year 1908 of their joint properties. In this partition they purported to include the 2nd defendant and to allot to him a proportionate share of the joint properties. The 2nd defendant has subsequently assigned a portion of the property which he alleges he has thus acquired title to the assignee, the respondent. The learned District Munsif found that the 2nd defesdant got his share as a gift or that he got it in consideration of the fact that he surrendered part of his property to the 1st defendant by exchange. In either case he held that as the property was over Rs. 100 in value and there was no registered instrument, whether the transaction was a gift or exchange, it offended against the provisions of the Transfer of Property Act. The learned Additional Subordinate Judge on appeal held that the 2nd defendant was made a co-sharer. I must say I find it difficult to understand how the 2nd defendant could be made a co-sharer as he was admittedly not a member of the joint family and therefore not a co-parcener. The learned Judge further says that the transaction was not a gift, but a partition of family property of which family 2nd defendant was not a member. In Ex. C the 2nd defendant apparently described the property as having been given to him by way of gift. The comment of the learned Additional Subordinate Judge that this recital is interlineated is a mistake, the word or words simply having been underlined in the course of the argument. The learned Subordinate Judge bases his finding on the authority *Girhi Rani Misrani* v. *Chandra Lal Kanth* (1). It is sufficient to say that this decision has been considered in S. A. No. 225 of 1920 by a Bench of this Court by which decision I am, sitting as a single Judge, bound. The Calcutta case was very carefully examined in that second appeal and Napier, J. says:—" I know of no authority for the proposition that the formal requirements of the Transfer of Property Act can be avoided by calling a transaction by a particular name under the Hindu Law." Krishnan, J., considering the same case, says that the Judges in the Calcutta case did not treat the case before them as one of gift, but they do not say under what category it falls. " It does not appear that they meant to

1. (1912) 17 C W N 62.

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treat it as a family arrangement, but if it was meant to hold that a person could, by the mere recognition of another as a co-sharer of his, convey title to him of immoveable property without observing any of the formalities required by law for it, I am, with all respect, unable to follow their view." Reference may also be made to the Privy Council case reported in *Ramkishore Kedarnath* v. *Jainarayan Ramrachhpal* (2). Therefore as regards Issue 4 I think the Subordinate Judge is clearly wrong and with regard to this the appeal must be allowed with costs. Mr. Bhashyam Aiyangar has, however, represented that the appeal should not be wholly disposed of in this manner, but that the case should be sent back to the Lower Appellate Court to be dealt with on Issues 1 and 2. No objection has been raised by Mr. Anantakrishna Aiyar to this course being adopted. What I propose to do is to allow this appeal with costs and the case as to Issues 1 and 2 will be remitted to the Lower Appellate Court for decision. It will also consider whether any and what valid title has been acquired by the 2nd defendant independently of the points decided in this judgment. Appellant will have the Court-fee of the second appeal refunded.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Metta Rama Bhatlu ... *Appellant** (*3rd Deft.*)

v

Metta Annayya Bhatlu and others ...*Respondents* (*Plffs. and Defts.* 1 & 2.)

Rama Bhatlu v. Annayya Bhatlu.

Specific Relief Act, Ss. 12, 21—Contract to transfer immoveable property—Specific performance of—Right of purchaser to—Provision in contract for damages for default by either vendor or vendee—Effect—Decree of Appellate Court for specific performance—Time allowed to plaintiff for payment by—Extension of—Jurisdiction of that Court—When extension will and will not be granted.

In a suit for the specific performance of a contract to transfer immoveable property, it was contended that the contract was not one of which performance could be enforced by virtue of S. 21 of the Specific Relief Act because it was a contract for the non-performance of which compensation in money was an adequate relief. There was a condition in the contract for the payment of damages in default of performance, whether by the vendor or by the vendee.

*S. A. No. 750 of 1922, C R P No. 442 of 1925 4th February, 1925
and C M P No. 258 of 1925.

2. (1913) I L R 40 C 966: 25 M L J 512 (P C).

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So far as the default on the purchaser's part was concerned the provision for default was admittedly security for performance and there was nothing to show that the clause with reference to the default on the part of the vendor was for any other purpose. The amount fixed as damages was not high.

Held, that the contract was not one for the non-performance of which compensation in money was an adequate relief and that specific performance had therefore been rightly decreed.

The Court which grants or passes a decree for specific performance of a contract for the transfer of immoveable property, though an Appellate Court, has power to extend the time allotted by its decree for payment by the plaintiff. In considering whether time should be granted, it has to be remembered that the delay need not be explained so minutely in such a case as in a case, for instance, under the Limitation Act where it is sought to excuse a bar of limitation.

Where the plaintiff was not aware of the provisions in the decree until the time for payment had passed and the main cause for the delay appeared to be the inordinate time taken by the Lower Appellate Court in granting a copy of its decree, *held* that the delay ought to be excused and the time for payment extended.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Vizagapatam in A.S. No. 380 of 1922 (A. S. No. 295 of 1920 on the file of the District Court) preferred against the decree of the Court of the District Munsif of Rajam in O. S. No. 33 of 1919 and C. R. P. No. 442 of 1923 and C. M. P. No. 2580 of 1923.

B. Satyanarayana for appellant.

Y. Suryanarayana for respondents.

The Court delivered the following

JUDGMENT:— *S. A. No. 750 of 1922*. This is an appeal by the 3rd defendant against the decree for specific performance of a contract of sale entered into by defendants 1 and 2 in favour of the plaintiffs. It has been found that the contract was a valid contract and that the 3rd defendant (appellant) purchased the property from defendants 1 and 2 with notice of the contract. The only question argued in the appeal is that the contract is not one of which performance can be enforced by virtue of S. 21 of the Specific Relief Act (I of 1877), because it is a contract for the non-performance of which compensation in money is an adequate relief. Under S. 12 of the Act "unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money." This rule would *prima facie* apply here; but it is argued that as there is a condition in the

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contract for the payment of damages in default of performance, whether by the vendor or by the vendee, it must be held that the parties considered that the enforcement of these damages would be adequate in case the contract is not performed. So far as the default on the purchaser's side is concerned, it is not suggested that the provision for default can be treated otherwise than as furnishing security for performance. There is really nothing to show that the clause with reference to the default on the part of the vendor was for any other purpose. It is suggested that as the amount fixed as damages was high, such damages must be deemed to be adequate relief, but as the amount is only Rs. 37-8-0 it does not seem to me a tenable contention.

There are no other circumstances to prove that in this case money compensation is adequate. Consequently this plea must be rejected.

The Second Appeal is dismissed with costs.

In C. R. P. No. 442 *of* 1923 *and C. M. P. No.* 258 *of* 1923 :—Before the appeal was filed the plaintiff failed to deposit money in accordance with the decree of the Lower Appellate Court, and it has been held by that Court that it had no power to alter its order giving three months' time for the payment and it dismissed the petition put in by the plaintiff for extension of time and also the petition put in for amendment of the decree. The plaintiff has filed a Civil Revision Petition against this order and has also put in a petition in this Court asking for extension of time to be granted in case the second appeal is dismissed. So far as the revision petition is concerned, it appears to me that in accordance with the principles laid down in *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib* (1), the Lower Court had power to extend the time. It is argued that that decision relates only to the order of an Original Court, but as it is based on the fact that an order for a specific performance of this nature is in the nature of a preliminary decree and that the Court does retain power to make any stipulation it thinks fit with reference to the performance I think that power must vest in the Court which actually passes the order for specific performance and the language of the judgment in the case support this view—both the judgments of the late learned Chief Justice and of Wallace, J. From the fact that the Subordinate Judge dismissed the plaintiff's

1. (1922) 44 M L J 107.

[illegible] where the charge is found to be groundless, that is to say, in other words, where the evidence on the record is such that no tribunal, Judge or Jury would ever convict the accused on that evidence, the enquiring Magistrate is bound to commit for trial. What the enquiring Magistrate has got to try and determine is not whether the case has been made out but only whether there is a case for trial. It must be held that there is always a case for trial when the evidence [illegible] to be proved or disproved only as the result of the [illegible] and the weighing of the evidence.

Where the enquiring Magistrate discharged the accused, because he considered that the case against the accused had not been made out, *held*, that the order of discharge was based on a mistaken notion of the function of the enquiring Magistrate, and that the District Magistrate was justified in interfering in revision with that order.

The High Court will not interfere in revision with an order of the District Magistrate setting aside in revision an order of discharge by the enquiring Magistrate unless the order of the District Magistrate is clearly wrong.

The District Magistrate ought not, on a revision filed against an order of discharge of the enquiring Magistrate, set it aside against accused who have not been made parties to the revision and who have not had an opportunity to show cause against the order being set aside so far as they were concerned.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate of Trichinopoly, dated 29th January, 1924, in Criminal Revision Case No. 28 of 1923, preferred against the order of the Court of the First Class Magistrate of Udayarpalayam Taluq, dated 5th November, 1923, in P. R. Case No. 1 of 1923.

T. Richmond, V. L. Ethiraj and *K. P. Raman Menon* for petitioners.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER:—I am asked in this Criminal Revision Case to revise the order of the District Magistrate of Trichinopoly by which under the provisions, as I take it, of S. 437 of the Criminal Procedure Code (and not S. 436 as it appears in the papers) he directed, setting aside the order of discharge passed by the First Class Magistrate of Udayarpalayam, that all the accused in the case be committed for trial to the Sessions Court of Trichinopoly.

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The order of the 1st Class Magistrate of Udayarpalayam was passed as the result of the enquiry into the case which was triable by a Court of Session and under the provisions of S. 209, cl. 1 of the Criminal Procedure Code. The

learned District Magistrate has in his order set out as follows: "I direct that under S. 436, Criminal Procedure Code, that the accused be committed for trial for the offences for which they have been charged. Warrants will issue for the arrest of the accused and their production before the Court of Session." This order was made by him on a Criminal Revision Petition filed on behalf of the 1st prosecution witness, and the only persons who were made respondents to the petition were accused 1 to 13 and accused 18, and the prayer was that those respondents should be arrested and ordered to be committed for trial before the Sessions Judge of Trichinopoly. The other accused in the case namely accused 14 to 17 and 19 to 23, were not made respondents to that petition, and no notice appears also to have been ordered to or served upon them. In these circumstances, it must be fairly clear that the order of the District Magistrate to the effect that all the accused should be arrested and committed for trial to the Sessions Court without excluding accused 14 to 17 and 19 to 23 from the scope and operation of the order was due merely to a mistake but none the less serious so far as those accused were concerned. As those accused, namely accused 14 to 17 and 19 to 23 were not respondents to the Criminal Revision Case and were not required to be committed for trial under the petition the District Magistrate was considering and as in any case they have had no opportunity of showing cause why an order of commitment should not be made against them also, the order of the District Magistrate so worded as to include them also is clearly wrong. The order therefore will be modified by substituting in the operative portion for the word "accused" the words "accused 1 to 13 and accused 18." The other accused, namely 14 to 17 and 19 to 23, if already arrested under the order of the District Magistrate will be forthwith released and set at liberty. The order of commitment so far as the said accused 14 to 17 and 19 to 23 are concerned is also set aside. As regards the other accused, however, there is no such irregularity in the order of the District Magistrate and they were further parties respondents to the Criminal Revision Case filed before him and it was after hearing them that the learned District Magistrate has passed the order in question.

The learned Counsel here Mr. Ethiraj has contended before me that the order of the District Magistrate directing their commitment also was wrong and should be set aside. He

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based his contention on two grounds : firstly, that the District Magistrate erred in his view of the law regarding the duty and function of the committing Magistrate conducting the preliminary enquiry ; and secondly, that in any case it was not on the merits a proper case in which the order of commitment should have been made.

It was thus argued before me on behalf of the petitioners that a Magistrate conducting an enquiry under Chapter 18 of the Criminal Procedure Code was bound to commit the accused for trial before the Court of Session only if in his judgment the evidence before him was such that if nothing else or nothing more were proved the accused should be convicted of the charge, or, in other words, that the Magistrate was entitled to discharge the accused if in his judgment the evidence produced before him was not conclusive of the guilt of the accused. The result of such a contention would undoubtedly make the enquiry before the Magistrate the first trial and the proceedings before the Sessions Court the second trial of the accused. It was said that such was, however, the intention of the legislature because there was a provision made in the chapter not only for the examination-in-chief of the prosecution witnesses but for their cross-examination and re-examination, for the accused calling any witnesses they might choose, for the Court citing any witnesses of its own motion and so forth. The position was also sought to be supported by the learned Counsel for the petitioners by reference to a number of decided cases mostly of this Court.

It is clear from the Procedure Code that only one trial is contemplated and that the enquiry before the Magistrate in cases triable by a Court of Session is only in the nature of a preliminary enquiry. Ss. 209 and 210 of the Criminal Procedure Code speak only of there being or not being sufficient grounds for committing the accused for trial. When the legislature speaks of sufficient grounds for committing for trial, it should not be supposed to have spoken of sufficient grounds for conviction, and similarly when the legislature speaks of there not being sufficient grounds for committing for trial it should not be supposed to have spoken of there not being sufficient grounds for conviction.

It follows from this that the intention of the legislature clearly is to make a distinction between grounds for conviction and grounds for committing for trial. Satisfactory proof of

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had to see whether the prosecution has adduced such evidence as is not on the face of it absolutely incredible in regard to every ingredient of the offence that is charged. This differs, if at all, only in form from what I have said.

The case of *Karuppa Chetti v. Balaswami Goundan* (3) does not relate to a case triable by a Court of Session and has therefore no bearing on the present question.

In the case of *In re Ponnan Thirumalai Pandaya Thevar and others* (4) Mr. Justice Kumaraswami Sastriar speaks of there being a *prima facie* case and the discretion of the Magistrate and his power to weigh the evidence. I cannot agree that the learned Judge intended to lay down anything more than that the enquiring Magistrate may discharge if he is of the opinion that the evidence relating to the guilt of the accused is most untrustworthy. It is significant that that learned Judge while speaking of a *prima facie* case also adds that it is not the business of the committing Magistrate to usurp the function of the Sessions Judge or the jury and in that respect that learned Judge speaks as in agreement with the observations of Bakewell, J. in the case of *The National Bank of India, Ltd. v. Kothandarama Chetty* (5).

On the one side there is of course the extreme suggestion that the committing Magistrate is bound to commit if there should be any evidence whatsoever in support of the charge whatever the quantity or quality of such evidence may be. Equally there is the contention on the other extreme that the committing Magistrate is not bound to commit unless a *prima facie* case is made out. On the authorities and on the reason of the thing I have no hesitation in stating that both these extreme contentions are untenable. If it should be conceded that the committing Magistrate has no right to usurp the function of the Judge or jury, that is, the function of trying the case itself and deciding whether or not the accused is guilty, it follows that what the enquiring Magistrate has got to try and determine is not whether the case has been made out but only whether there is a case for trial. It must be held that there is always a case for trial when the evidence is of such a nature that the guilt of the accused can be held to be proved or disproved only as the result of the valuing and the weighing of the evidence. But, on the other hand, if the evidence be of

3. (1919) 10 L W 630. 4. (1921) 42 M L J 49.

5. (1913) M W N 728.

such a nature that no reasonable person and no tribunal, Judge or jury would ever on that evidence hold the accused guilty, it follows that there is no case for trial and it is then a case for the enquiring Magistrate to discharge. Manicka Padayachi, *In re.*

Now in the case before me the enquiring Magistrate has no doubt written a long and considered judgment, but at the same time it is abundantly clear that he has really mistaken his function. If he had said that the evidence was of such a nature that no Court could possibly on that evidence regard the accused as guilty, I should not have hesitated to give effect to that opinion more especially having regard to the fact that the Magistrate saw the witnesses and had an opportunity of judging of their credibility. But what he set himself to decide was not whether there was a case for trial or, in other words, whether there was any reasonable ground for the charge but whether the prosecution had made out the case set up. In paragraph 24 of his order he states thus : "Some of the evidence on the side of the defence appears to be more probable. In the end I consider that the case against the accused has not been made out and accordingly discharge them under S. 209, cl. 1 of the Criminal Procedure Code." It was not his province to decide whether the case had been made out by the evidence or not. All that he had to do was to find if the charge was groundless and, if it was not, to commit the accused for trial. It is not merely a case in which the learned enquiring Magistrate has failed to appreciate his proper function in the case but the whole of his judgment and order would seem to be vitiated by a belief that he was there and then to decide having regard to the credibility of the witnesses, their statements, etc., whether the case laid had been made out. I cannot consider that this was a proper course for him to take.

The order of discharge therefore being improper it follows that the District Magistrate was justified in interfering in revision. If I should at the present stage seek to go into the merits and express my opinion on the evidence, it may operate to the prejudice of the accused. If the order of discharge was wrong as having been the result of proceeding on a wrong principle, it follows that the District Magistrate was not only competent but justified in interfering and all that I am now concerned is to see whether the order of the District Magistrate is so clearly wrong as to call for my intervention. So far as the order of commitment made by the District Magis-

Manicka Padayachi, *In re.*

trate related to accused 14 to 17 and 19 to 23 I have already decided that the order was wrong and should therefore be set aside. As regards the other accused 1 to 13 and 18, not being satisfied that the order of the District Magistrate was clearly wrong, I do not feel called upon to interfere and with regard to those accused therefore the petition is rejected.

The accused 1 to 13 and 18 who have been committed for trial will be released on bail on their furnishing security to the satisfaction of the Sub-divisional Magistrate of Udayarpalayam each in his own bond for Rs. 500 with two sureties for Rs. 250 each.

A. S. V. *Order modified.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Allahabad.)

PRESENT:—LORD SUMNER, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

Jag Prasad Rai and another ... *Appellants**

v.

Musammat Singari ... *Respondent.*

P. C.

Jag Prasad Rai *v.* Musammat Singari.

Hindu Law—Re-union—Onus of proof of—Co-owners—Co-parceners or partners—Test—Evidence—Entry in village papers—Payment of taxes, etc.—Money advanced on mortgages or applied in purchasing property—Banking accounts—Probative value of—Presumption—Documents—Non-production—Presumption from.

When co-parceners in a Mitakshara family had separated an argeement to re-unite must be proved like any other fact, and, if not proved, they remain separate.

Entries in khewats and other similar village papers showing that the shares of co-owners have been specified afford by themselves no proof that the owners were members of a joint Mitakshara family or had separated. Similarly payments jointly of Government revenue, taxes, income-tax and such like payments do not by themselves indicate that the parties making such payments were joint or separate; the parties may have been carrying on business as partners and not as Hindu co-parceners. For the same reason the fact that money had been lent on mortgages, or had been applied in the purchase of property, does not by itself indicate that the money was or was not the separate money of Hindu co-parceners. The fact that two or more Hindus had a banking account does not by itself prove that the moneys received by the bank were

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*P C Appeal No. 78 of 1923. 2nd December, 1924.

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Jag Prasad Rai v. Musammat Singari.

moneys of a joint Hindu family or of Hindus who were partners in farming or other business.

When a party does not produce a document which he could and ought to have produced and does not satisfactorily explain its non-production, the Court is entitled to draw the inference that if it was produced it should not support that party's case.

Appeal from a judgment and decree of the High Court (Sir G. Mears, C. J. and Sir P. C. Banerji, J.), dated the 13th July, 1921, reversing a judgment and decree of the Additional Subordinate Judge of Gorakhpur (K. Abdul Ali, Esq.), dated the 24th April, 1918.

The facts appear from the judgment of their Lordships.

L. de Gruyther, K. C. and *Majid* for appellants.

A. M. Dunne, K. C. and *Dube* for respondent.

2nd December, 1924. The Judgment of the Board was delivered by

Sir John Edge.

SIR JOHN EDGE :—This is an appeal by the plaintiffs from a decree of the High Court at Allahabad, dated the 13th July, 1921, which reversed a decree of an Additional Subordinate Judge of Gorakhpur, dated the 24th April, 1918.

The family to which the parties to the suit belonged is a Hindu family which is governed by the law of the Mitakshara. The following pedigree (at p. 164) shows how the parties to the suit are connected with each other, but in reading the pedigree as printed, it must be read from the right of the reader to his left. Sheo Narain was the eldest son of Bal Krishn Rai and of his seven younger brothers, Durga Prasad was the youngest.

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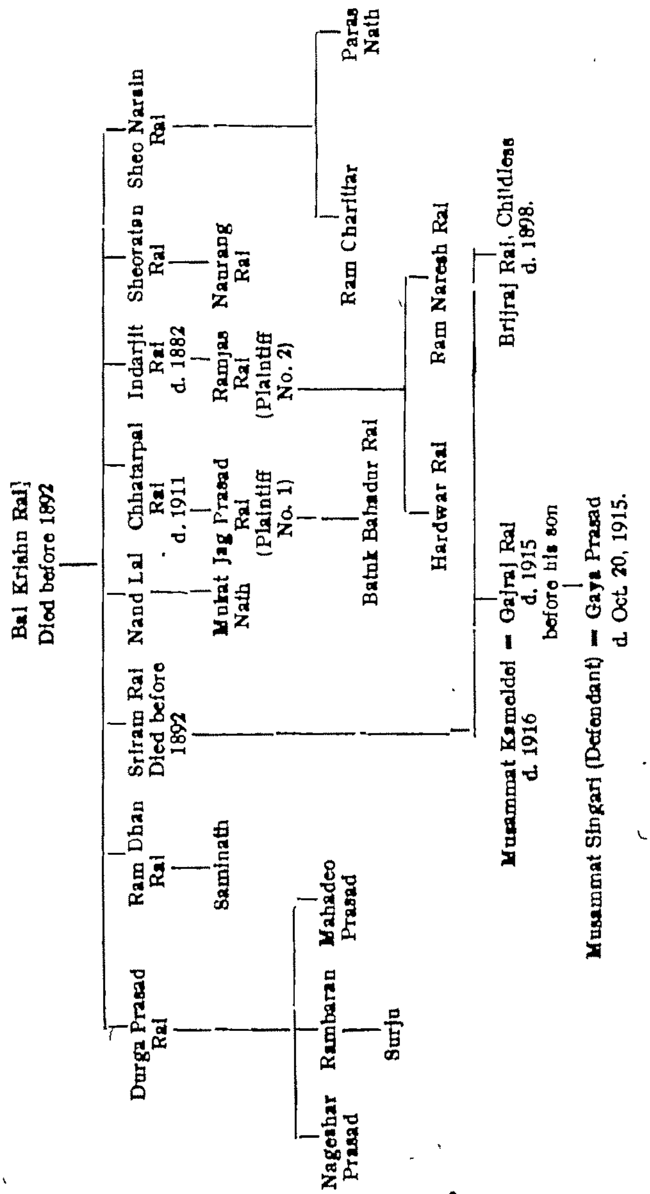

The suit in which this appeal has arisen was brought by Jag Prasad and Ram Jas Rai against Musammat Singari, the widow of Gaya Prasad, who died childless, for possession, or a declaration that the plaintiffs are entitled to the possession of property of which Gaya Prasad died possessed on the allega-

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Sir John Edge.

tion that they and Gaya Prasad were, when he died, members of a joint Mitakshara family.

Bal Krishn had eight sons who are shown in the pedigree, and he with his eight sons, when they were all living, constituted a Mitakshara joint family. The family was possessed of several villages and other property. The family lived at Sonchiraiya, which was the principal ancestral village. Their Lordships do not know when Bal Krishn died, but he died several years before 1892. Indarjit, who was the third son, died in 1882. Sriram, Ram Dhan and Durga Prasad, who were the sixth, seventh and eighth sons, died before 1892. All the eight sons had married and had a son or sons who were living in 1892. In 1892 the family agreed that Sheo Narain, who was the eldest son of Bal Krishn, should partition the joint family property into eight equal shares. The intention of such a partition obviously was that there should be a separation of the family into eight families, each representing one of the eight sons of Bal Krishn and his descendant or descendants and joint within itself. In their Lordships' opinion the effect of that agreement was that the previous joint family separated into eight families. Thereupon Sheo Narain in 1892 partitioned the joint property into eight shares. The parties to the agreement were not satisfied that the eight shares into which Sheo Narain had partitioned the property were equal in value, and on the 3rd January, 1895, the following persons, describing themselves as Nand Lal Rai, Chhatarpal Rai and Sheo Ratan Rai, sons of Bal Krishn Rai, deceased; Nageshar Prasad Rai, Rambaran Rai and Mahadeo Prasad Rai, sons of Durga Rai, deceased; Brijraj Rai and Gajraj Rai, sons of Sri Ram Rai, deceased; Shami Nath Rai, son of Ramdhan Rai, deceased; and Ram Jas Rai, son of Indarjit Rai, deceased, appointed three arbitrators to make the partition in eight equal shares of the property in Sudar tahsil, district of Gorakhpur, and other tahsils.

One of the three arbitrators died before an award was made and thereafter the co-sharers who were parties to the agreement of the 3rd January, 1895, executed on the 18th February, 1896, an agreement by which they appointed the two surviving arbitrators and another man in the place of the deceased arbitrator, as arbitrators to partition the property in eight equal shares. The agreement of the 18th February, 1896, contained the following authority and directions to the arbitrators:—

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"The said arbitrators becoming unanimous should conscientiously take down the evidence on oath of each party on every point, examine the quality of every land on the spot, and at their pleasure amend or not amend the map and the lots prepared by Sheo Narain Rai, arbitrator. The arbitrators should in the lot which they may form include bonds, mortgage-deeds, decrees, cows, bullocks, etc., the property of all sorts in the districts of Azamgarh and Gorakhpur and Nepal *ilaqa* (which has been omitted) equalising the value. The arbitrators should separate the share of all the 8 persons. Each party will be liable for payment of revenue of the share which will be allotted to him in a particular village. If any bond or any property is found to be the exclusive property of any party, his statement may be taken down on oath and the same may not be partitioned. The arbitrators should mark out the land forming the share of each party. Each party is at liberty to carry on his business either separately or jointly. Whatever may be the decision of the arbitrators about all sorts of expenses shall be valid. The parties would accept the award of the arbitrators unanimously arrived at on the points mentioned above, and no party shall deviate from it, but if any party deviates, his objection shall not be entertainable by the Court. The arbitrators are competent in every way to do what they like. All of us, the executants, shall be bound by the award which all the three arbitrators will make unanimously. The arbitrators should allot equally unculturable and *dihat* lands and fruit and timber trees of all sorts to each co-sharer. They are at liberty to alter or uphold the lots mentioned above. They should make *thaks* of productive and unproductive lands equalising their value. As regards the lots to be prepared by the present arbitrators, all of us, the executants, agree that if, on account of any previous act, the whole or part of the lot of any party be disturbed in some way, all of us, the executants, shall be responsible therefor and shall make it up from our respective share. As regards the rights of all of us, the holders of 8 *thoks*, whatever the arbitrators will determine and record, the same shall be accepted by us. We, the executants, representing the 8 *thaks*, shall accept whatever the award the arbitrators will make unanimously about the property of all sorts belonging to us. Nobody will raise any objection, and if he raises any, it shall not be entertainable by this Court. Hence we have executed this agreement so that it may be of use in time of need.

"Dated 18th February, 1896."

Their Lordships would infer from that agreement that the parties to it or some of them had, although the family had separated, been carrying on some business jointly as partners.

Before the arbitrators made their award, Sheo Narain and his brother Nand Lal had agreed to re-unite together, and they made an application to the arbitrators that two shares should be dealt with in the award as one undivided share. Their Lordships quote paragraph 5 of the award which was made as showing what that application was. It is as follows:—

"(5) Out of the holders of 8 lots, Sheo Narain Rai, the former arbitrator, prepared a lot in his name and another in that of Nand Lal Rai separately

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and gave different colours in the map in accordance therewith. Now both these persons apply and make statement on oath that both of them are joint in the entire business connected with the village and Court and are joint in mess, that a single lot of the entire moveable and immoveable property may be drawn up for both of them at the time of partition or that both the lots may be joined in one and represented by one colour, and that subsequently both of them, or their heirs, will get the entire moveable and immoveable family property partitioned half and half either by mutual consent or through court, when they will choose to do so. Hence, as desired by both the persons, their lots were joined in one, but they will be represented by former colours."

In compliance with that application the arbitrators allotted to Sheo Narain and Nand Lal two out of the eight shares which they partitioned to Sheo Narain and Nand Lal as one joint share. The arbitrators made their award on the 19th December, 1896.

The High Court and the Subordinate Judge came to concurrent findings, that the award effected a separation of the joint family. In their Lordships' opinion the joint family had separated when they agreed in 1892 that Sheo Narain should partition the joint property in eight shares, and that there was no agreement between the co-parceners to continue to be a joint family. The question thus arises whether Chhatarpal, his son Jag Prasad and Ramjas, ever agreed with Gajraj Rai and his son Gaya Prasad to re-unite as a joint family. It has been contended on behalf of the plaintiffs' appellants that those persons did agree to re-unite, and that they had agreed to re-unite before the arbitrators made their award. If there was a re-uniting it was for the plaintiffs to prove it.

In *Balabux Ladhuram* v. *Rukhmabai* (1) it was distinctly held by the Board that when co-parceners in a Mitakshara family had separated an agreement to re-unite must be proved like any other fact, and that, if not proved, they remain separate. Some doubts were entertained as to the effect of that decision and it was contended in *Hari Bakhsh* v. *Babu Lal* (2), that it meant that when brothers who were co-parceners separated their separation necessarily involved that the sons of one of those brothers had separated from each other. In *Hari Bakhsh* v. *Babu Lal* (2) the Board disposed of that contention and pointed out what Lord Davey meant by the judgment of the Board which he delivered in *Balabux Ladhuram* v. *Rukhmabai* (1) as to a re-uniting of a separated family.

1. (1903) L R 30 I A 130.
2. (1924) L R 51 I A 163 : 47 M L J 958.

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It was contended by the pl
Judge, the High Court and this
tion to that which was success
by Sheo Narain and Nand Lal
by Chhatarpal, Ramjas, Brijraj
shares allotted to them jointly
re-united, but that the arbitrat
application as Gajraj had not
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united and that they had made t
applied to the Court when the
to be filed as a decree to send th
so that they might make it com
parties. No such application
Subordinate Judge stated in his

> "I do not consider it is at all u
> (to the arbitrators) and Gajraj being a
> necessary by the arbitrators in a matter of
> discarded."

The Subordinate Judge did not
in fact, made to the arbitrators.
alive when the suit was being d
Judge and might have been ab
an important application was ma
who is a plaintiff in this suit, sw
been made to the arbitrators.
lieve him or that any such appl
arbitrators. The learned Judg
question also said :—

> "Further, when about a month
> namely, on 15th January, 1897, all the
> Subordinate Judge to have the award m
> made to the Court that the decree sh
> grouping together into one lot the shares
> the brothers, Brijraj Rai and Gajraj Rai
> in fact, been a reunion) would not hav
> any of the owners of the other shares wo

The plaintiffs also relied upon
Mangal that such an application
tors ; he swore that in his pres
Chhatarpal if the three lots (sh
they replied "owing to your illn
made joint," and that Gajraj th
as heretofore" and that Brijr

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L R 47 I A 57 : 38 M L J 521.

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villages, which was
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parties to it Nageshar
Swami Nath, Naurang
himself and as guardian
Chhatarpal. In that p

"Application for correc
'tappa' Marchwar, 'pargana' B

"The petitioner begs

"1. The parties belo
property was partitioned by
arbitration, which was given e
Naikot aforesaid was allotted
shares were allotted to the peti
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"2. Every co-sharer has entered into possession of his lot allotted to him by the arbitrators; but it has not been given effect to in the public papers up till now. It is, therefore, hereby prayed that the following corrections may be made in the 'khewat':—

NAMES OF SHARERS.	AMOUNT OF SHARE.
Ramjas Rai	1 anna 2 pies and 12 chhatanks.
Swami Nath Rai	1 anna 6 pies and 2 chhatanks.
Dudh Nath, Naurang, Maheshwari Rai, sons and heirs of Shiva Ratan Rai, deceased	1 anna 4 pies and 4 chhatanks.
Mukut Nath Rai, son and heir of Nand Lal Rai, deceased, Ram Charittar Rai and Paras Nath Rai, sons and heirs of Shiva Narain Rai, deceased	1 anna 5 pies and 9 chhatanks.
Gajraj Rai for self and heir of Brijraj Rai, deceased	1 anna 2 pies and 12 chhatanks.
Chhatarpal Rai	1 anna 2 pies and 9 chhatanks."

Ramjas signed that petition on the 6th December, 1902, and he made at the foot of the petition the following declaration, which he also signed :—

"I declare that the particulars set forth in this petition are true."

Their Lordships assume that the petition of the 6th December, 1902, of Ramjas was presented to the Collector of the District or to some Revenue official under him and it appears not to have been complied with, and on the 19th September, 1907, Chhatarpal presented to the Revenue official of the District a similar petition for the correction of the khewat of Mauza Naikot, and he made as opposite parties to it Gajraj, Ramjas, Mukut Nath, Ram Charittar for himself and as guardian of Paras Nath, a minor, Naurang Rai, Nageshwar Prasad, Mahadeo Prasad and Sarja Prasad. In that petition Chhatarpal said :—

"1. The parties held an ancestral eight-anna share in the said share and were in possession of the same as the members of a joint Hindu family.

"2. Subsequently, a partition was made by arbitration, and under the arbitration award confirmed by the Civil Court, the shares in the said ancestral eight-anna share were allotted to each of the co-sharers as per specification given below.

"3. Under the arbitration award, every co-sharer is in possession of his share. Corrections in the 'khewat' relating to other villages have already been made ; but the corrections in the 'khewat,' relating to this village, have not been made with reference to the said award. It is, therefore, hereby prayed that corrections may be made in the 'khewat' with reference to the arbitration award."

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Jag Prasad Rai
v.
Musammat Singari.

Sir John Edge.

"NOTE.—Gajraj Rai, Jag Prasad Rai, and Ramjas Rai have purchased from Swami Nath under a registered sale-deed, the one anna 6 pie 3 chhatank share which was allotted to him under the partition award. They shall make a separate application for mutation of names in respect of that share.

Specification of shares in respect of which amended entries are to be made in the 'khewat' with reference to the arbitration award :—

NAMES OF CO-SHARERS.	Amount of shares to be entered against the names of the co-sharers with reference to the arbitration award.
Naurang Rai and Musammat Salhanta, heirs of Shiva Ratan Rai (?) deceased	1 anna 4 pies and 4 chhatanks.
Gajraj Rai	1 anna 2 pies and 12 chhatanks.
Chhatarpal Rai, petitioner	1 anna 2 pies and 9 chhatanks.
Ramjas Rai	1 anna 2 pies and 12 chhatanks.
Mukut Nath Rai and Ram Charittar Rai for self and as the guardian of Paras Nath Rai, minor, heirs of Shiva Narain Rai and Nand Lal Rai	1 anna 5 pies and 9 chhatanks."

Jag Prasad, as the son and general attorney of Chhatarpal, signed Chhatarpal's name to a declaration at the foot of the petition that the particulars set forth in the application were true.

Having regard to those petitions of 1902 and 1907, and to the attempted specification of shares by Sheo Narain in 1892, and to the award of 1896, there cannot be the least doubt that the joint family which descended from Bal Kishn separated into eight families, two of which, Jai Narain's and Nand Lal's, re-united before the award was made.

It is true that the plaint of the 11th February, 1902, of Gajraj, Chhatarpal and Ramjas (Exhibit 7), if it stood alone and could not be explained, would afford strong evidence that Gajraj, Chhatarpal and Ramjas constituted a joint family of which Brijraj was a member. But in 1892 the joint family, which then existed without doubt, had separated and Chhatarpal, Gajraj and Ramjas were not re-united as a joint family. Possibly the explanation is that the statement that the plaintiffs in that suit were joint with Brijraj was the work of the pleader who prepared the plaint as the easiest way of explaining how those plaintiffs had a right of suit on a hypothecation bond which had been given in favour of Brijraj alone in 1897.

The statement in the plaint of the suit for malicious prosecution which Ramjas, Jag Prasad and Gajraj brought in

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Sir John Edge.

1912 that they "are members of a joint family," which has jointly paid Rs. 900 as revenue and Rs. 65 as income-tax, their Lordships also consider to be worthless in face of the crucial documents to which they have referred.

The conclusion at which their Lordships have arrived is that the decree of the High Court of the 13th July, 1921, dismissing the suit of the plaintiffs with costs was right and that this appeal should be dismissed with costs, and they will accordingly humbly so advise His Majesty.

Solicitors for appellants : *Francis* and *Harker*.

Solicitor for respondents : *H. S. L. Polak.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL.

(On Appeal from the Court of the Judicial Commissioner of the Central Provinces.)

PRESENT :—LORD SUMNER, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

P. C.

Dhanraj Joharmal v. Soni Bai.

Dhanraj Joharmal ... *Appellant**

v.

Soni Bai ... *Respondent.*

Hindu Law—Adoption—Who may give in adoption—Delegation of power of giving—Adoption of orphan—Validity—Agarwallas—Doctrines applicable to—Adoption among—Nature of—Who may be adopted—Ceremonies necessary—Evidence Act, S. 115—Adoption—Status of, if can be acquired by estoppel—Adoption in fact—Erroneous representation as to its validity in law—If creates estoppel—Decree—Objections to—Time for raising—Raising of, just before hearing of Privy Council Appeal—Permissibility—Practice.

Under the Hindu Law, it is essential to the validity of an adoption that the child should be "given" to the adopter by the father, or, if he be dead, by the mother. No other person has the right, nor can such right be delegated to anybody else. Consequently, a boy who has lost both his parents cannot be adopted.

The Agarwallas generally adhere to Jainism and repudiate the Brahminical doctrines relating to obsequial ceremonies, the performance of Shradh, the offering of oblations for the salvation of the soul of the deceased, nor do they believe that a son, either by birth or by adoption, confers spiritual benefit on the father. Consequently adoption is with them a mere temporal arrangement and has no particular object.

Whatever difference there might be between the various sub-sects of Agarwallas in the ritual of worship, there does not appear to be any in the rules relating to adoption recognised by the caste as a whole.

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*P C Appeal No. 135 of 1923. 2nd February, 1925.

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Dhanraj Joharmal v. Soni Bai.

Among the Agarwallas the qualifying age for adoption extends to the thirty-second year; and the only ceremony consists in tying a turban round the head of the young man who is being adopted, in the presence of the principal men of the community (the *panchas*) and giving them a feast.

Quaere: Whether a status that rests on religious rules and religious sanctions and involves the performance of religious duties such as that of an adopted son can be established by applying the doctrine of equitable estoppel embodied in S. 115 of the Evidence Act, so as to affect the rights of persons other than the adopter.

In a case in which the factum of adoption is admitted and there is no misrepresentation as to it, *held*, that an erroneous representation that it is valid in law creates no estoppel whatever between the parties. Such a case is to be distinguished from cases relating to adoptions acquiesced in and recognised for a number of years by the person making the adoption, in which cases the Courts considered in substance that a long course of recognition and acquiescence on the part of the person, who was best acquainted with the circumstances, gave rise to the inference that the conditions relating to the adoption were duly fulfilled.

The appellant claimed to have been validly adopted by the brother of one *R* and contended that *R* was estopped from questioning the validity of his adoption. The parties belonged to the caste or sect of Agarwallas. The only acts and representations of *R* relied upon as creating the estoppel were that he brought the appellant to the alleged adoptive father's village from his native village, and had become a witness to a deed of adoption relating to the appellant; that he (*R*) allowed the appellant to perform the cremation ceremony of his (*R's*) brother; and that at the time of the appellant's marriage, he (*R*) represented the appellant to be the adopted son of his brother.

Held, that there was no substance whatever in the plea of estoppel raised by the appellant.

To allow a litigant to bring forward shortly before the hearing of an appeal to the Privy Council exceptions to a decree which had never been urged before, is open to very grave objection.

Appeal from a judgment and decree (12th March, 1920) of the Court of the Judicial Commissioner (Prideaux and MacNair, JJ.) which reversed a judgment and decree (28th January, 1918) of the Additional District Judge of East Berar (F. H. Staples, Esq.).

The material facts sufficiently appear from the judgment of their Lordships.

L. de Gruyther, K. C. and *S. Hyam* for appellant.

A. M. Dunne, K. C. and *B. Dube* for respondent.

2nd February, 1925. The Judgment of the Board was delivered by

Mr. Ameer Ali.

MR. AMEER ALI:—This appeal arises out of a suit brought by the plaintiff, Soni Bai, in the Court of the Additional District Judge of Amraoti, in East Berar, for a declaration that she

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Dhanraj Joharmal v. Soni Bai.

Mr. Ameer Ali.

was entitled by inheritance to the estate of her father, Ramdhan Marwari, who died at Amraoti on the 24th June, 1914. She was a minor at the time and brought the suit by her guardian, her father-in-law, Narain Das, as next friend.

The facts of the litigation may be stated shortly for the purposes of this judgment. Ramdhan, the plaintiff's father, resided at a place called Khanapur, Taluk Morsi, in the district of Amraoti and carried on business there; whilst his brother, one Joharmal, lived in the township of Chandur Bazar, in Taluk Ellichpur, where he had a shop. Both were Agarwallas by caste.

Joharmal died in September, 1912, and the defendant Dhanraj claims to have been adopted by him some years before his death. On the death of Ramdhan in 1914, Dhanraj took possession of his estate, claiming to be entitled to Ramdhan's property as the adopted son of his brother Joharmal. There appears to have been a proceeding under S. 145 of the Code of Criminal Procedure with regard to the possession of certain lands belonging to Ramdhan, and by an order of the District Magistrate made on the 17th September, 1914, the defendant was put in possession of that property also.

In order to establish his right to the succession to Ramdhan's estate, in opposition to the claim of Ramdhan's rightful heir, the defendant alleged that he had been adopted in accordance with the rules prescribed by the Hindu Law and that the essential rites were duly performed. He further alleged that Joharmal and Ramdhan were joint and undivided.

The plaintiff's case, on the other hand, is that in the year 1908, when the formal adoption of Dhanraj took place, he was an orphan and as such could not be validly adopted under the Hindu Law. She further controverted the defendant's allegation that Joharmal and Ramdhan were joint. She alleged that they were separate in estate and carried on separate businesses and that consequently Dhanraj, even if he had been validly adopted, which he was not, could not claim the estate of Ramdhan. As a contradictor to the allegation of the plaintiff that in 1908, both his parents being dead, he could not be validly adopted, the defendant averred that some years before, viz., in 1903, his mother, who was alive at the time, gave him in adoption to Joharmal, although the usual ceremonies and documents connected with the adoption were completed in 1908. He further contended that Ramdhan

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was estopped by his conduct from impugning the validity of the adoption and that, consequently, the plaintiff was affected by the same estoppel.

On these respective allegations of the parties a number of issues were framed by the Additional District Judge, three of which only need consideration, viz. : (1) whether the defendant was validly adopted ; (2) whether Joharmal and Ramdhan were joint in estate ; and (3) whether the plaintiff is estopped from challenging the validity of the defendant's adoption.

It is contended on the plaintiff's behalf that, unless the defendant can establish that the "giving and taking" required by the Hindu Law took place in the lifetime of his mother in 1903, nothing which occurred in 1908 would constitute him a validly adopted son of Joharmal, or entitle him to the estate of Ramdhan, even if Ramdhan and Joharmal were joint. A mass of evidence was adduced on both sides ; the Additional District Judge was of opinion that the defendant had established the adoption, and accordingly dismissed the suit. On appeal, the Court of the Judicial Commissioner, after a careful analysis of the evidence, came to a totally different conclusion. They have held that the defendant had failed to prove that there was a "giving and taking" as required under the Hindu Law in 1903 ; nor were Ramdhan and the plaintiff "estopped" from impugning the validity of the defendant's adoption. In view of the minute examination of the facts by the learned Judicial Commissioners, their Lordships are relieved of the necessity of discussing them in detail ; they, therefore, propose to confine their attention to the salient features of the case.

On the 25th May, 1908, two deeds were executed, one by Joharmal in favour of the defendant, whose parental name was Ghanasham, declaring that he was being adopted by Joharmal as a son and that thenceforth he would be called Dhanraj ; the other was executed by the brothers of Dhanraj, the defendant, in favour of Joharmal, declaring that they had from that day forth given their younger brother Ghanasham to Joharmal in adoption. The deed of adoption executed by Joharmal is Ex. "D. 63," and the agreement by the two brothers of Dhanraj is Ex. "D. 62."

This document "D 62" contains the passage, "Our mother gave him in adoption just in his childhood," on which

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the defendant's allegation of the "giving and taking" in 1903 mainly, if not entirely, rests. The plaintiff charges that this passage is an interpolation made after its execution for the purpose of corroborating the statements of witnesses as to the "giving and taking" in the lifetime of the mother. The reasoning of the Additional District Judge on this point appears to be open to criticism; he seems to think that as the evidence of the witnesses for the defendant was "consistent" and was corroborated by the passage in question in "D. 62," their statements being thus corroborated he was of opinion that it could not be an interpolation. Relying practically on the statement in question contained in "D 62," in conjunction with the oral testimony, he came to the conclusion, as already stated, that the defendant had been validly adopted by Joharmal, and that, as Joharmal and Ramdhan were joint in estate, Dhanraj was entitled to the latter's estate.

The Judicial Commissioners consider the passage on which the Additional District Judge rested his decision, as corroborating the story of the defendant's witnesses, was an interpolation.

They also held against the defendant on the plea of estoppel. In view of their decision on the question of fact relating to the adoption, they did not consider it necessary to determine whether Joharmal and Ramdhan were separate or joint.

In the appeal to His Majesty in Council, exception is taken to the conclusions of the Judicial Commissioners on both points. Firstly, it is urged that the factum of a valid adoption in accordance with the rules of Hindu Law is conclusively established on the evidence; and, secondly, that Ramdhan was estopped by his conduct and representations from questioning the validity of the adoption, which equally affects the plaintiff.

Admittedly, under the Hindu Law, it is essential to the validity of an adoption that the child should be "given" to the adopter by the father or, if he be dead, by the mother. No other person has the right, nor can such right be delegated to anybody else (Mayne's Hindu Law, para. 132). Consequently, a boy who has lost both his parents cannot be adopted.

In 1908 both the parents of the defendant were dead. In order to establish his adoption as valid under the Hindu

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Law, he has put forward two allegations : viz., that his mother before her death went actually through the formal ceremony of "giving," and that before she died she delegated the authority "to give" to his two elder brothers. If she had already given him in adoption, the subsequent delegation of authority would seem to be superfluous. Any such delegation would, however, be invalid. The defendant, therefore, had to establish that in 1903, when his mother was alive, she gave him in adoption to Joharmal, and that consequently he is vested with all the rights that appertain to an adopted son under the Hindu system.

The language of the deed of adoption, to which reference has already been made, requires careful attention. After reciting that he has no male issue and old age has approached, he goes on to say :—

"I have this day taken you in adoption before the *panchas* and with the consent of your brothers. You are my kinsman and your father was my *gotraj bandhu*. Consequently, for religious purposes and with a view to perpetuate my lineage, I have taken you in adoption, performing the adoption ceremony, presenting you with the turban and giving a feast to all the *panchas*. Therefore you have become the owner of my moveable and immoveable property from this day. You have acquired the same rights as my born son has from this day. None else than you is my heir. You have become the owner of my shop. From this day you will be named Dhanraj, son of Jawharmal Gargoti. May you live long ! This is my sincere blessing. I have executed this deed of adoption with my free will and pleasure. It is binding against my estate and heirs. Dated the 25th May, 1908. By the pen of Bhagwant Balaji of Chandur Bazar."

It will be noticed that in this document there is no reference to the essential ceremony of "giving and taking" which, if performed, would naturally occupy the forefront of the deed. It expressly states in so many words that he (Joharmal) had taken the defendant in adoption "this day" (25th May, 1908) "before the *panchas*" (the principal members of the caste). No Brahmin or Jati (priest) is mentioned, and the ceremony performed to effectuate the adoption, "presenting him with a turban and giving a feast to the *panchas*," has no connection with religious rites. The last part of the document is precise in its language and in effect :—

"You have acquired the same rights as my born son from this day....... From this day you will be named Dhanraj."

The agreement executed by Kaluram and the other brother of the defendant is as follows :—

"We both and Ghanasham are three real brothers. You and we are kinsmen of the same caste. You having no male issue, we have, with a view

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to perpetuate your line, given you in adoption our younger brother Ghanasham, 13 years of age, with our free will and pleasure this day, and having his adoption ceremony performed with our free will and consent have presented him with a turban. Ghanasham being regarded as your son has acquired the same rights as your born son would have had. He has become the owner of your moveable and immoveable property from this day. We both have ceased to have any interest whatsoever in that boy. And that boy has ceased to have any ownership to our property henceforward. The boy in question is given in adoption in the presence of you and us and the village *panchas*. Our mother gave (him) in adoption just in his childhood. From this day the boy in question is named Dhanraj, son of Jawharmal, and will be so called in future also. May this family thrive!

"Our right of brotherhood, to the said boy has been given up from this day. We have ceased to have any ownership whatsoever henceforward. If we set forth any right, it will be null and void by virtue of this document. We have executed this agreement with our free will and consent. It is binding against our estate and heirs. Dated 25th May, 1908. By the pen of Bhagwant Balaji of Chandur."

It will be noticed that it declares :—

"Ghanasham, being regarded as your son, has acquired the same rights as your born son would have had. He has become the owner of your moveable and immoveable property *from this day*. That boy has ceased to have any ownership in our property *henceforward*. The boy in question is given in adoption in the presence of you and us and the village *panchas*."

After the passage charged by the plaintiff as having been interpolated, comes the following :—

"*From this day* the boy in question is named Dhanraj, son of Joharmal, and will be so called in future also."

Then comes the following passage :—

"Our right of brotherhood has been given up from *this day*. We have ceased to have any ownership whatsoever henceforward."

The reference in D.62 to the giving of the boy by the mother, considering the importance of the ceremony under Hindu Law, strikes one as cursory and creates the impression that the casualness of the reference was due to its compression owing to the exigencies of space. It is in these words : "Our mother gave him in adoption just in his childhood." This solitary reference to a vitally important ceremony has been held by the Judicial Commissioners to be an interpolation. They point out that it was perfectly possible to insert this sentence immediately after the previous words. However that be, there is great force in their observation that the words alleged to be interpolated are quite inconsistent with the main purpose of, and the statements in, the documents "D. 63" and "D. 62." These two deeds, in their Lordships' opinion, instead of supporting the evidence on behalf of the defendant, appear to

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contradict the allegation of a ceremony, and a real effective ceremony, in 1903.

Bhagwant, the writer of the two deeds, was cross-examined respecting the reason why he had omitted in "D. 63" all reference to the ceremony by the mother. His answer, in their Lordships' opinion, is most unsatisfactory. He said as follows :—

"There were two drafts. It did not strike me then that there was any difference between the actual facts and the recitals of the drafts. The recitals in the deeds were not inaccurate at the time of writing. (The recital about the name of Dhanraj starting that day is read out.) Strictly speaking, there is a mistake. It is customary to write in this way that the name is changed from the date of writing, and so I did not object to it. I do not remember which of the two documents was written first. Though I knew that the boy had been actually adopted I did not insert that as it was not in the draft. I have been writing documents for the last 35 to 36 years."

Bhagwant professes to have been present at the ceremony said to have been performed in 1903. But neither Kaluram nor Chaturbai, the widow of Joharmal, who is supporting the defendant, mentions him. He is a professional "petition writer" and he gives no reason why, if he was present, no document was executed on that occasion. Another statement of his, to say the least, is extraordinary. He said, evidently in answer to a question why the ceremony of adoption was not completed in 1903 :—

"The boy was given in adoption on Dashera day in Sambat 1960, but no writing was made that day. His mother and his brothers had come there. His mother gave the boy in adoption to Jowarmal. No document was written then as they wanted to wait for an auspicious year. Jowarmal executed Exhibit D. 63 in my presence. Kaluram and Jowarmal (his brother) executed Exhibit D. 62 in my presence."

According to him the auspicious year did not occur until 1908!

The boy's family lived at the village of Thugaon. The school register produced by the schoolmaster of that place shows that between 1903 and 1907 long after the alleged "giving and taking" he lived in his parental home in Thugaon. As the Appellate Court points out, this circumstance is wholly inconsistent with his having been adopted in 1903, when it is said he was actually made over to Joharmal. Had he been then given in adoption he would have resided with his adopting parents, his name would have been changed, and he would have taken up his position as the adopted son of Joharmal. In the school register he is entered in his original name of Ghana-

sham. The question, why was he entered as Ghanasham if he had been adopted in 1903, is answered by the deeds executed on the 25th May, 1908.

The statement of Chaturbai, the widow of Joharmal, contradicts in material particulars those of Kaluram, the brother of Dhanraj. In their Lordships' opinion the oral evidence regarding an adoption in 1903 is wholly unworthy of credit.

Their Lordships agree with the Judicial Commissioners in holding that the defendant has failed to establish his allegation of the adoption in 1903.

But it has been strongly contended that Ramdhan and his heir are estopped by the provisions of S. 115 of the Indian Evidence Act (1 of 1872) from questioning the adoption.

That section runs as follows :—

"Where one person has by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

What are the "declarations, acts or omissions" of Ramdhan which are said to constitute the estoppel ? It is not necessary to decide in this case whether a status that rests on religious rules and religious sanctions and involves the performance of religious duties can be established by mere estoppel. Assuming, however, that such a status can be established by applying the doctrine of equitable estoppel embodied in S. 115, so as to affect the rights of persons other than the adopter, it is necessary to consider in the first place what actually happened in 1908, and what were the acts and representations of Ramdhan which created the estoppel. He is said to have brought the boy to Chandur Bazaar from his native village, to have become a witness to the deed of adoption ; allowed him to perform the cremation ceremony of Joharmal ; and at the time of his marriage represented him to be the adopted son of Joharmal.

The parties to this litigation belong to the caste or sect of Agarwallas. These Agarwallas, as has been pointed out in the case of *Bhagwant Das Tejmal* v. *Rajmal* (1), generally adhere to Jainism and repudiate the Brahminical doctrines relating to obsequial ceremonies, the performance of *Shraddh*,

1. 10 Bom. H. C. R. 24.

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the offering of oblations for the salvation of the soul of the deceased, nor do they believe that a son, either by birth or by adoption, confers spiritual benefit on the father.

The Agarwallas are said to be divided into a number of sub-castes or sects. In the case of *Sheosingh Rai* v. *Mussamat Dakho* (2) in the High Court of Allahabad, which afterwards came before the Judicial Committee, and the judgment of the learned Judges was affirmed by this Board, the parties belonged to the Saraoji sub-caste. In the present case it is not clear to what sub-sect Joharmal adhered, but the evidence shows that the defendant belongs to the Sekhavati sect. The majority of the defendant's witnesses appear to be Moheshris. Whatever difference there might be between these sub-sects in the ritual of worship, there does not appear to be any in the rules relating to adoption recognised by the caste as a whole. The learned Judges, who decided in the High Court of Allahabad the case of *Mussamat Dakho* (2) state the difference between the Brahminical Hindus and the Jains in the following words:—

"They differ particularly from the Brahminical Hindoos in their conduct towards the dead, omitting all obsequies after the corpse is burnt or buried. They also regard the birth of a son as having no effect on the future state of the progenitor, and consequently adoption is a mere temporal arrangement and has no particular object."

Among the Agarwallas the qualifying age for adoption extends to the 32nd year; and the only ceremony consists in tying a turban round the head of the young man who is being adopted, in the presence of the principal men of the community (the *panchas*) and giving them a feast. According to the document D. 63, as well as the agreement D. 62, this was the only ceremony performed in 1908, and it is exactly the ceremony referred to in *Mussamat Dakho's case* (2).

Their Lordships have no doubt on the evidence that the story about a regular Hindu or, rather, Brahminical adoption in 1903 was invented with the object of giving to an ordinary Agarwalla adoption, the rights of collateral succession, and with the same object the statement had been put forward that the defendant had been adopted by both brothers, Joharmal and Ramdhan, which is held to be illegal under the Hindu law.

If the Brahminical fringe is taken off, the whole of the evidence in the present case points to a secular adoption in

2. 6 N W P H C R 382.

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1908, and so far as the representation and acts of Ramdhan are concerned, they only relate to that adoption.

This Board in the case of *Gopee Lall* v. *Mussamat Sree Chundraolee Buhoojee* (3), on the question of estoppel, urged in similar circumstances, said as follows :—

"It has been argued on the part of the appellant that the defendants in this case are estopped from setting up the true facts of the case, or even asserting the law in their favour, inasmuch they have represented in former suits and in various ways, by letters and by their actions, that Luchminjee was the adopted son of Damodurjee adopted by Damodurjee's widow, his mother. But it appears to their Lordships that there is no estoppel in the case. There has been no misrepresentation on the part of Luchminjee or the defendant on any matter of fact. They are alleged to have represented that Luchminjee was adopted. The plaintiff's case is that Luchminjee was in fact adopted. So far as the fact is concerned there is no misrepresentation, it comes to no more than this that they have arrived at a conclusion that the adoption which is admitted in fact was valid in law, a conclusion which in their Lordships' judgment is erroneous ; but that creates no estoppel whatever between the parties."

A number of rulings of this Board and a decision of the Madras High Court have been referred to in support of the contention that the plaintiff is estopped. Closely examined, it will be seen that those cases relate to adoptions acquiesced in and recognised for a number of years by the person making the adoption, and the Courts considered in substance that a long course of recognition and acquiescence on the part of the person, who was best acquainted with the circumstances, gave rise to the inference that the conditions relating to the adoption were duly fulfilled. In *Rani Dharam Kunwar* v. *Balwant Singh* (4) the estoppel was considered purely personal.

Their Lordships are in entire agreement with the ruling of the Board in *Gopee Lall's case* (3), and think that there is no substance whatever in the plea of estoppel raised by the defendant. On the whole they are of opinion that the judgment of the Court of the Judicial Commissioner is sound and that this appeal should be dismissed with costs.

The appellant has, however, taken some exception to the decree made by the Appellate Court. No such objections were either embodied in the grounds of appeal or brought to the notice of the learned Judges. It was only shortly before the hearing of the appeal here that notice was given to the respondent to the effect that objections would be urged against the decree on the hearing. Their Lordships think that to allow a litigant to bring forward at this stage exceptions to a decree,

3. 19 W D R 12. 4. (1912) L R 39 I A 142 at 148 : 23 M L J 200.

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which have never been urged before, is open to very grave objection. The course adopted in the present case was reprehended by the Board in the case of *Mussamat Dakho* (2) already referred to, and their Lordships propose to adhere to the principle laid down there. It seems, however, necessary that the decree as framed should be put into a more practical shape in order to avoid difficulties in the execution Court.

The plaintiff attached six schedules to her plaint. Schedule "A" sets out the amount standing to the credit of the plaintiff's mother in the books of Ramdhan including her ornaments. Schedule "B" refers to immoveable property consisting of fields, etc. Schedule "C" includes money lent on mortgages, etc. Sch. "D" relates to outstandings on current accounts, decrees, etc. Schedule "E" gives the amounts due by the plaintiff to certain specified people, and Schedule "F" relates to moveable property alleged by the plaintiff to have been taken by the defendant.

The appellant in his reply denied that he took forcible or unlawful possession of the property in dispute. He did not deny the fact that he did take possession of the property. In paragraph 6 of his reply he denied that the property mentioned in Schedule "A" was the property of the plaintiff's mother. In paragraph 7 he stated that he had not removed any ornaments and cash from the safe of Ramdhan. In paragraph 8 he stated that the ornaments pledged by Ramdhan to Kaluram belonged to the joint estate of the defendant and Ramdhan and that he was entitled to them ; in paragraph 11 he says that the property mentioned in Schedules "B," "C," "D," "E," and "F" does not belong to the plaintiff but to the defendant. Practically he admits having taken possession of all the property which the plaintiff claimed to belong to the estate of Ramdhan. In these circumstances their Lordships think that the decree should run in the following terms :—

(1) that it should be declared that the plaintiff is entitled by right of succession to the estate of her father Ramdhan; (2) that there should be a decree for possession of the immoveable properties claimed by the plaintiff ; (3) that there should be a decree for the delivery of the ornaments and other moveable property taken possession of by the defendant ; (4) that the defendant should deliver to the plaintiff all documents of title, securities for loans such as mortgages,

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decrees, etc., which came into his hands as appertaining to Ramdhan's estate; (5) that if necessary there should be an enquiry as to what was the *Stridhan* property of the plaintiff's mother; an account of what is due to Kaluram on the ornaments pledged to him, and (6) an account of the debts of, and outstandings belonging to, Ramdhan's estate realised by the defendant with liberty to the parties to apply to the Court for directions.

In case any of the debts have been barred by the wilful neglect or default of the defendant he would necessarily be liable for those debts. For the purpose of taking these accounts and giving effect to the decree generally a Receiver should be appointed.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs, and that the amendments they have indicated should be embodied in the decree.

Solicitors for appellants: *Barrow, Rogers* and *Nevill.*

Solicitor for respondent: *H. S. L. Polak.*

A. de M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS.

Narasimha Charyulu and another ... *Appellants** (*Defts.*)

v.

Sowcar Lodd Govindoss and another ... *Respondents* (*Plaintiffs*).

Narasimha Charyulu v. Sowcar Lodd Govindoss.

Civil Procedure Code, S. 102—Claim for jodi and road cess—Nature of—Small cause nature—Provincial Small Cause Courts Act, Sch. II, Art. 13.

A suit for jodi, rusums and road cess is similar to a claim for rent and is one of a small cause nature, not falling within Sch. II, cl. 13 of the Provincial Small Cause Courts Act, and where the amount does not exceed five hundred rupees, no second appeal lies. S A No. 593 of 1899 and 24 Mad. 508 followed.

Second Appeal against the decree of the Court of the Subordinate Judge of Chittoor in A. S. No. 135 of 1921 (A. S. No. 534 of 1920 on the file of the District Court of Chittoor) preferred against the decree of the Court of the District Munsif of Chittoor in O. S. No. 79 of 1920.

T. K. Srinivasathathachari for appellants.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for respondents

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* S A No. 1124 of 1923. 26th February, 1925.

Narasimha Charyulu v. Sowcar Lodd Govindoss.

The Court delivered the following

JUDGMENT :—A preliminary objection is taken that no appeal lies as the suit is of a small cause nature of a value of less than Rs. 500. It is not disputed that this Second Appeal deals only with a matter of a small cause nature, namely, a claim for jodi and road cess which has been held by this Court to be similar to a claim for rent, but it is contended that in the original Court the plaintiff included with his claim for rent a claim for a cess called *Savari Nasar* which is of the nature of the cesses mentioned in cl. 13 of the Second Schedule of the Provincial Small Cause Courts Act (IX of 1887). It does not appear from the plaint that any special claim was made for *Savari Nasar* but the claim was made for jodi, russums, etc., as mentioned in the *adambadika* account and this coupled with the evidence of P. W. 1 would show that the claim was for rent including the russums mentioned. It has been held in S. A. No. 593 of 1899 which was approved *Harischandra Deo* v. *Narayana* (1) that where cesses have been paid as part of the rent a suit to recover them does not fall within cl. 13 of the Second Schedule of the Provincial Small Cause Courts Act. Applying that decision to this case it would appear that this suit was one for rent which also included certain cesses. This would be a suit of a small cause nature and not of the character mentioned in cl. 13. The objection must be upheld and the appeal dismissed with costs.

T. S. V. *Objection upheld : Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Chennama Naidu and others ... *Appellants** (*Defendants*)

v.

Venkatammal ... *Respondent* (*Plaintiff*).

Chennama Naidu v. Venkatammal.

Deed—Construction—Maintenance grant—Paddy—Quantity fixed and price in lieu of it—Default in payment—Market value if can be claimed.

A maintenance deed recited that the executant thereof was to deliver a certain fixed quantity of paddy "worth Rs 39 for every year, 3 podies of *Sambali* paddy without moisture........If at any time the giving of maintenance is delayed, at the rate of 13 only for every podi money should be collected or sued for." Default having been committed, the maintenance holder sued for its price at the market rate. *Held,* on a construction of the deed, it

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*S. A. No. 837 of 1922. 18th February, 1925

1. (1901) I L R 24 M 508.

Chennama Naidu v. Venkatammal.

gave an option to the defendant to pay maintenance in kind or in cash at the rate mentioned therein and hence the market value cannot be claimed.

The general principle governing such cases is that it is not an invariable rule that where a lessee or other person undertakes to pay rent or maintenance or any such thing in kind, he should always pay it in kind. Where an option is given to the promisee to pay in kind or in money and if the amount payable in money is fixed in the document, Courts should not go behind the document and say that the intention of the parties was to pay only in kind.

Second Appeal against the decree of the District Court of Salem in A. S. No. 92 of 1921, preferred against the decree of the Court of the District Munsif of Namakkal in O. S. No. 349 of 1920.

K. Ramanath Shenai for appellants.

C. V. Anantakrishna Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The only point urged in this second appeal is whether the plaintiff is entitled to get maintenance secured under Ex. A at the rate at which paddy was selling on the date of the plaint. Both the Courts have given a decree for the amount of paddy payable to her at the rate prevailing on the date of the plaint. Mr. Ramanath Shenai, on behalf of the appellants, urges that Ex. A provides for payment of money in lieu of the payment of maintenance in kind, and his client is entitled to pay maintenance at the rate mentioned in Ex. A. On the other side, it is contended that the document provides for payment of maintenance in kind and that the value of the paddy is given only for the purpose of ascertaining the value for registration purpose and that there is no option to the defendant to pay maintenance in money at the rate mentioned in the document. The recital in the document is "to deliver that paddy worth Rs. 39 for every year, 3 podies of *Sambali* paddy without moisture and chaff before 17th November every year according to measure by which paddy is measured for sale. On failure to give every year, with interest at the rate of 4 vallams for every year on the outstanding paddy from the date of default. Lower down there is this clause: "If at any time the giving of maintenance is delayed, at the rate of 13 only for every podi, money should be collected or sued for." But for the latter clause I would be inclined to hold that the defendant is bound to deliver paddy according to the document and in default of delivering paddy he should pay the value of the paddy at the market rate. The concluding portion of the document is

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emphatic in its terms and gives an option to the defendant to pay at the rate of 13 for every podi. If the value of the paddy is given either for the purpose of registration or for some other purpose no doubt the defendant could not escape his liability to deliver paddy, and on default to pay the value of the paddy at the market rate. The respondent relies upon a number of cases in support of this contention that the defendant is bound to deliver paddy and in default to pay the value of the paddy at the market rate for wherever the claim is made. Only recently I decided in S. A. No. 460 of 1922 following the decision of a Bench of this Court that a lessee was bound to pay the value of the paddy at the rate ruling on the date of the plaint. But the terms of that document are not the same as the terms of the document in this case. Here the concluding portion of the document which I have already extracted is emphatic and it gives the defendant an option to pay maintenance in kind or in cash at the rate mentioned in the document. There are a number of decisions on this point and they are not at all reconcilable. The difficulty has arisen from the fact that Courts have tried to interpret one document in the light of recitals of another. Where there is no general principle governing the interpretation of the document I think each document should be interpreted as it reads. It is not proper to go outside the document to try to find out what the intention of the parties to the document was in fixing a certain amount as the value of the grain rent payable. In a recent case reported in *Asutosh Mukerjee* v. *Haran Chandra Mukerjee* (1) the learned Chief Justice and two other learned Judges have held that it was not the invariable rule that the rent should be paid in kind, and that each document should be interpreted according to its tenor. In that case reference was made to a number of previous cases and also to an unreported decision of Maclean, C.J. and Banerji, J. The principle deducible from all these cases is that it is not an invariable rule that where a lessee or other person undertakes to pay rent or maintenance or any such thing in kind he should always pay it in kind. Where an option is given to the promisee to pay in kind or in money and if the amount payable in money is fixed in the document, Courts should not go behind the document and say that the intention of the parties was to pay only in kind. It is unnecessary to discuss the cases

1. (1919) I L R 47 C. 133.

to which my attention was drawn by the learned Vakil for the respondent. I think the document is clear in its terms and I must give effect to its terms. In the view I have taken I think the judgment of the Court below cannot be supported.

It is also vehemently urged by the learned Vakil for the respondent that this is a maintenance arrangement and the plaintiff is entitled to have the maintenance paid in kind as it is required for her food. But that would not take away the force of the clause at the end of the document. I therefore consider that the decrees of the Lower Courts on this point is wrong. I allow the plaintiff the amount mentioned in Ex. A as the value of the paddy which was payable on default of payment of the 3 podies of paddy. The plaintiff will have a decree for Rs. 39 with interest at the rate mentioned in the document till the date of deposit. In the circumstances I do not think I should allow costs to the appellant. Both parties will bear their own costs in this Court.

T. S. V. *Second Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR.

Achratlal Kesavlal Mehta and Co., by proprietor Achratlal and Kesavlal ... *Petitioners* (Defts.)*

v.

Vijayam and Co., by proprietor, G. Vijiaraghavachariar ... *Respondents (Plaintiffs).*

Indian Contract Act, S. 28—Contract for purchasing and sending goods from one place to another—Clause treating all legal disputes as having arisen at one of the places only—If an agreement in restraint of legal proceedings.

A firm doing business at Ahmedabad was appointed agent by a Madras firm for purchasing at Ahmedabad and sending to Madras bales of *dhoties*. The agreement contained a clause that "in all legal disputes arising out of the contract, Ahmedabad will be understood as the place where the cause of action arose." In a suit filed in Madras for recovering amounts alleged to be due in respect of dealings between the parties, the defendants pleaded that under the agreement, the Madras Court had no jurisdiction to entertain the suit. *Held,* where there are two Courts both of which would normally have jurisdiction to try a suit, an agreement between the parties that the suit should be filed in one of those Courts alone and not in the other does not contravene the provisions of S. 28 of the Contract Act, and the Madras Court could not, therefore, entertain the suit.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise

* C R P No. 674 of 1924. 27th January, 1925.

Achratlal Kesavlal Mehta & Co. v. Vijayam & Co.

the order, dated 17th January, 1924, Presidency Court of Small Causes, Madras, in New Trial Application No. 111 of 1923 in S. C. S. No. 8979 of 1921.

K. P. Mahadeva Aiyar for petitioners.

A. Ragunatha Rao for respondents.

The Court delivered the following

JUDGMENT :—This revision petition arises out of a suit instituted in the Madras Small Causes Court, and the only question raised is whether the suit can be entertained by the Madras Court.

The plaintiffs are a firm of merchants at Madras and the defendants are residents of Ahmedabad. The defendants' firm was engaged by the plaintiffs as their *Adat* agents for the purpose of purchasing 80 bales of Ahmedabad dhoties from manufacturers at Ahmedabad and sending them to Madras. Ex. I is the deed of agreement which regulated their relationships *inter se*. The suit is for the recovery of the amount alleged to be due to the plaintiffs in respect of the several dealings between the parties.

The defendants besides denying the plaintiffs' allegations on the merits also set up the plea that the suit should not be entertained by the Small Causes Court at Madras and that it should be instituted at Ahmedabad. They relied for this purpose on clause 8 of Ex. I, deed of agreement mentioned above, which runs as follows :—" In all legal disputes arising out of this contract Ahmedabad will be understood as the place where cause of action arose."

The learned trial Judge interpreted the above clause to mean that the parties thereby stipulated that all suits in respect of the contract should be instituted at Ahmedabad. He held that this agreement did not offend against the provision in S. 28 of the Indian Contract Act, because no party thereto is restricted *absolutely* from enforcing his rights under or in respect of the contract, usual legal proceedings in the ordinary tribunals, inasmuch as the restriction is only partial. He accordingly decided that the agreement was valid and must be given effect to and that the suit should, therefore, be brought in the Ahmedabad Court and in that view dismissed the suit.

On application by the plaintiffs, the Full Bench of the Small Cause Court consisting of all the three Judges considered the question again ; they agreed with the trial Judge in his interpretation of the above clause, but the majority of the

Judges held that the agreement is void because it ousts the jurisdiction of the Madras Court. They, therefore, remanded the suit to the trial Judge for enquiry as to whether the cause of action arose either in whole or in part within the local limits of the jurisdiction of the Madras Court and directed him to proceed with the suit if he finds that it did so arise, or to return the plaint [under S. 19 (*a*) of the Presidency Small Cause Courts Act] for presentation to the proper Court if he holds that it did not. The defendants have filed this revision petition against the decision of the Full Bench.

In the first place I do not think it is right to construe clause 8 of Ex. I so as to mean that no suit in respect of the contract shall be brought in the Madras Court at all under any circumstances. Supposing, for instance, the defendants at the time of the institution of the suit happened to reside or carry on business at Madras, that clause—which deals only with the question as to where the cause of action shall be deemed to have arisen—even if given full effect to, could not obviously stand in the way of the suit being instituted at Madras. It is, therefore, not strictly correct to say that the agreement by itself has the effect of ousting the jurisdiction of the Madras Court. But, even assuming that it has that effect, that is to say, that the agreement means that all suits in respect of the contracts should be brought at Ahmedabad only and not at Madras, I do not think that it is void, because the Ahmedabad Court is also a Court which would normally have jurisdiction to entertain those suits, I am, of course, assuming for the purpose that part of the cause of action in this case has arisen at Madras as well, so that the Madras Court would but for such agreement have jurisdiction to entertain the suit. Where there are two Courts both of which would normally have jurisdiction to try the suit, I do not see why the parties should not be allowed to agree among themselves that a suit should be brought in one of those Courts and not in the other. Such an agreement does not, in my opinion, contravene the provision in S. 28 of the Indian Contract Act, because the plaintiff is not thereby restricted *absolutely* from enforcing his rights under or in respect of the contract by the usual legal proceedings in the ordinary tribunals as the restriction is only partial. The case *Crawley* v. *Luchmee Ram* (1) relied on by the Full Bench

1. 1 Agra 129.

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is clearly distinguishable. In that case it was held that a clause in a Bill of Lading whereby it was agreed that the questions arising on the bill should be heard by the High Court of Calcutta instead of the Court at Mirzapur which was the proper tribunal to try the question was void and could not be pleaded in bar of a suit brought in the Mirzapur Court. There, the Calcutta High Court had no jurisdiction to try the suit, the only Court having jurisdiction being the Mirzapur Court. The case was decided before the Indian Contract Act came into force, but I think the decision would be the same even under S. 28 of the Act; for, as no amount of consent by the parties would confer jurisdiction on the Calcutta High Court and as the Mirzapur Court was the only Court having jurisdiction, the agreement has the effect of absolutely restricting the parties thereto from enforcing their rights under the contract contained in the Bill of Lading by the usual legal proceedings in the ordinary tribunals. In the present case, as stated above, the agreement has not this effect.

I would therefore hold that the agreement between the parties embodied in cl. 8 of Ex. 1 is valid and must be given effect to. It is not therefore open to the Madras Court of Small Causes to entertain the present suit. The plaint should be returned for presentation to the proper Court and I direct accordingly.

The defendants will get their costs up to date.

T. S. V. *Plaint returned for presentation to the proper Court.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

The Public Prosecutor, Madras ... *Appellant**

v.

Kimidi Annam Naidu and others ... *Accused.*

The Public Prosecutor v. Annam Naidu.

Penal Code, Ss. 353, 21—"Public servant"—Meaning—P. W. D. Lascar if a "public servant."

The definition of a public servant in S. 21 of the Penal Code, in which sense the words are used in S. 353, Indian Penal Code, includes every officer in the service or pay of Government.

If a P. W. D. lascar, who is carried on the regular establishment of the P. W. D., in the course of his duties carries out a function of Government, namely, the distribution of water from public irrigation channels, undoubtedly he

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*Criminal Appeal No. 326 of 1924. 27th November, 1924.

is Government for the purpose of that particular function and is therefore a "public servant" within the meaning of S. 353, Indian Penal Code.

The Public Prosecutor v. Annam Naidu.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Stationary Sub-Magistrate of Palakonda in C. C. No. 348 of 1923 on his file.

B. Jagannadha Doss for accused.

The Public Prosecutor, (*J. C. Adam*) for the Crown.

The Court delivered the following

JUDGMENT :—This is an appeal by Government against the acquittal of five accused persons who were charged with offences under Ss. 186 and 353 of the Indian Penal Code. The appeal as regards the former charges is not pressed, and we are concerned only with the offence under S. 353, Indian Penal Code.

The prosecution case was that P. W. 6, a P. W. D. lascar, went to enforce an agreement regarding the distribution of water for irrigation between the two villages of Gattamangalapuram and Chinnamangalapuram, which both take water from the Venkamma Channel ; that, on a complaint from Gattamangalapuram people that Chinnamangalapuram people had deprived them of their agreed turn, he went to open the sluices for Gattamangalapuram, but when he went and got into the channel to open the doors, apparently the sluices were plank sluices, the accused set upon him and pushed him down into the channel and threatened to beat him and take away his life. The accused were tried by the Stationary Sub-Magistrate of Palakonda and acquitted. The grounds of acquittal are first that a P. W. D. lascar is not a public servant within the meaning of S. 353, Indian Penal Code ; secondly, that, even if he is, this lascar was not discharging the duties of his office at the time of the assault; and thirdly, that the Gattamangalapuram people were not entitled to water that morning. The Public Prosecutor challenges each of these three points.

As to the first point we think the Lower Court is clearly wrong. The definition of a public servant in S. 21 of the Indian Penal Code, in which sense, of course, the words are used in S. 353, includes every officer in the service or pay of Government. A P. W. D. lascar, it is clear from G. O. No. 840-W, dated the 28th March, 1893, is a person carried on the regular establishment of the P. W. D. His duties are various, he taking his orders generally from the local

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overseer. The accused contend that, even so, he is not an officer, and referred us to a case in *Reg* v. *Ramajirav Jivbajirav* (1), which restricts the meaning of the word "officer" to a person employed to exercise to some extent a delegated function of Government. But even that ruling extends the definition to one whose duties are immediately auxiliary to those of some one armed with authority from Government. The case reported in *The Queen* v. *Nachimuthu and others* (2) does not help the accused, as that was a case of a carter temporarily employed by the P. W. D. In *Nazamuddin* v. *Queen-Empress* (3) a Bench held that the dictum in *Reg* v. *Ramajirav Jivbajirav* (1) is too narrow and that a salt peon, whose duties were not defined but whose general duty was to carry out the orders of his superior officer, was a public servant. If then the lascar in the course of his duties was carrying out a function of Government, namely, the distribution of water from public irrigation channels—and we think he clearly was—undoubtedly he is Government for the purposes of that particular function and is therefore a "public servant."

The next question is whether he was acting within the scope of his duties. It is argued for the accused and apparently accepted by the Lower Court, that because there was an agreement between the villagers as to the periods within which each should take water, therefore it was no business of the lascar to see that this agreement was carried out; that is, the accused pleaded that in effect, Government had handed over their duties in this matter to the villagers themselves. The Lower Court seems to base this view on Exs. A and F. Ex. A is simply a note by the Sub-divisional Officer laying down the terms of the agreement, and bearing the signatures of representative villagers. There is nothing in it or in the evidence to indicate that the charge of the distributing mechanism, the plank sluices, was taken away from the P. W. D. authorities and handed over to any villager. Ex. F is merely a note to the village munsifs that the new arrangement is to come into force from a particular Sunday. It is notable that, in Ex. F, there is no direction to the village munsifs themselves to carry out the arrangement. The accused did not, and cannot, before us, suggest who was put

1. 12 Bom. H. C. R. 1. 2. (1883) I L R 7 M 18.
3. (1900) I L R 28 C 344.

in charge of this distribution, if the P. W. D. subordinates were superseded. It is perfectly clear then that the duty of distribution was not given away to any one else by the P. W. D. and this is also borne out by the evidence. P. W. 1, the overseer, says that P. W. 6's duty was to regulate the distribution of the Venkamma Channel water, which at the time of the offence was to be distributed between the two villages according to the agreement in Ex. A. Not a single question was put to him in cross-examination to suggest that the distribution business had been taken away by him from his subordinate and handed over to any non-official. We are satisfied that the Lower Court is quite wrong in concluding that P. W. 6, in regulating the distribution of water at the time of the offence, was not acting within the scope of his duties.

The third point, it appears to us, has been found by the Lower Court in favour of the accused on an entire misapprehension of facts. Under the arrangement in Ex. A, the week was divided as follows : 2 1|2 days for Chinnamangalapuram, 1 1|2 for a hamlet of Chinnamangalapuram, and 3 days to Gattamangalapuram, and the turn was to commence on Sunday, the 13th May. The Lower Court assumes that Chinnamangalapuram was to begin the week, and on this assumption calculates that it was the turn of Chinnamangalapuram on the day of the offence, 17th June, 1923, and therefore the lascar had no right to give water to Gattamangalapuram on that day. But the Sub-Magistrate has entirely overlooked the evidence that Chinnamangalapuram had previously deprived Gattamangalapuram of two of its three days' water in the week and that that was the very reason why the lascar had to go and alter the distribution. It is preposterous for Chinnamangalapuram to contend that, although they had stolen two of Gattamangalapuram's days, they were yet entitled to keep their own days as well, on the principle of "heads win, and tails you lose." The lascar's obvious duty was to see that Gattamangalapuram got their three days' water in the week, whatever week-days those three days might be, when the wrongful action of the other party had disarranged the weekly order. The soundness of the Sub-Magistrate's finding that, because Gattamangalapuram got water given them by the Overseer on his visit on 12th June, 1923, therefore their turn expired on 15th June, 1923, depends entirely on whether Gattamangalapuram got water on the 13th and 14th after

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the Overseer left, a point with which he nowhere deals and on which the evidence is all to the contrary.

The prosecution witnesses, villagers, are probably going too far, when they claim that the days for Gattamangalapuram were Sunday, Monday and Tuesday ; but the real question is whether they were not entitled to water on that particular Sunday ; and all are agreed that, for three or four days prior to that day, Chinnamangalapuram had deprived them of water, and that they had none. The defence answer to the charge, namely that there was no agreement at all, really makes their case so much the worse, because then there can be no doubt that the P. W. D. were in charge. Their plea that Gattamangalapuram is not entitled to any water unless there is enough to carry water over the dam No. (1) is no answer at all in the face of the agreement, Ex. A, and it merely indicates that Chinnamangalapuram people were suffering from a guilty conscience in the matter.

We are therefore satisfied that it was the lascar's duty to distribute water to Gattamangalapuram on that Sunday and that he was doing so when the accused interfered.

The prosecution witnesses are agreed that accused 1 and 2 pushed the lascar down and that accused 3, 4 and 5 threatened him with sticks. There is no reason to disbelieve these witnesses, especially the independent evidence of the lascar, who has no motive for complaining falsely against the accused. Accused 1 and 2 have attempted to prove *an alibi* but the evidence is much too vague for proof. We are satisfied that all these accused did use criminal force to the lascar who is a public servant while he was acting in the discharge of his duties. They have therefore committed an offence under S. 353 of the Indian Penal Code. We therefore reverse the acquittal of these accused and convict them of an offence under S. 353 of the Indian Penal Code.

As regards the sentence, in view of the long delay in presenting the prosecution case, and the time which has now elapsed since the offence, a heavy sentence is not called for, particularly as this case had been brought up chiefly as a test case in order to obtain a ruling as to the legal position of P. W. D. lascars. We think it is sufficient to impose a fine of Rs. 20 on each of the accused; and do so accordingly, and we direct further that, in default of payment they will undergo simple imprisonment for two weeks.

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Two weeks time after receipt by the Lower Court of this judgment will be granted to respondents within which to pay the fine in the Lower Court.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice,* AND MR. JUSTICE KRISHNAN.

Albert Karunakaran Stephen ... *Appellant**

v.

The Administrator-General of Madras ... *Respondent.*

Karunakaran Stephen v. Administrator-General of Madras.

Will—Construction—Nature of estate taken by widow—Technicalities of Chancery practice—If to be imported into an Indian will in the vernacular.

The will of an Indian Christian contained the following words of disposition: "I hereby give away to my second wife X all the moveable and immoveable properties I possess. After me she should enjoy the said properties and she should at her death divide and give (the same) to these three persons, *i. e.,* A, B and C, according to the wishes of the aforesaid X." *Held,* on a construction of the will, it amounted to an absolute bequest in favour of X and not a mere life-estate coupled with a power of appointment.

Per the Chief Justice :—A Court should avoid holding that the technicalities of English Chancery practice about powers and so forth apply to an Indian will written in the vernacular by a person who knows nothing of the rules of their application.

Per Krishnan, J.—The direction to leave the properties to A, B and C is a mere matter of recommendation to the lady to do what the testator would have liked to be done with his property at the time of her death and is not a binding disposition in their favour.

On appeal from the order dated 23rd April, 1924 of the Hon'ble Mr. Justice Kumaraswami Sastri made in the exercise of Original Testamentary Jurisdiction of the High Court in O. P. No. 179 of 1922 in the matter of the last will and testament of Mrs. Annie Shangu Pillai, deceased.

N. K. Mohanarangam Pillai for appellant.

The Administrator-General for respondent.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS :—*The Chief Justice* :—In this case a man called Shangu Pillai, who was an Indian Christian, left a will, dated the 7th November, 1903, which has been the subject of dispute as to its true construction. The material words are: "I hereby give away to my second wife Annie Shangu Pillai all the moveable and immoveable properties I possess. After

*O. S. Appeal No. 55 of 1924. 6th February 1925.

Karunakarah Stephen v. Administrator-General of Madras.

Coutts Trotter, C. J.

me she should enjoy the said properties and she should at her death divide and give (the same) to these three persons, namely, my first wife's deceased daughter Manoranjitamani Ammal's children, (1) Samuel Rajaratnam, (2) Albert Karunakaran, and (3) Penelope Padma, according to the wishes of the aforesaid Annie Shangu Pillai." It has been argued strenuously before us and to a certain extent accepted by the learned Judge that this is not an absolute bequest to the widow but is a mere life-estate coupled with a power of appointment. I personally, whenever I can, avoid holding that the technicalities of English Chancery practice about powers and so forth are to be imputed to Hindu testators who know nothing whatever about them and, as far as possible, I adopt the construction which will steer clear of matters of this kind with which the parties are totally unfamiliar. It seems to me that a plain man interpreting the language of the will in the ordinary way woud say this was a gift to his widow with an expression of opinion that it would be desirable for her to divide the property obviously in what shares she pleased. Nobody contends that definite shares were provided for in the will for these three people. The words "according to the wishes of the aforesaid Annie Shangu Pillai" appear to me obviously to leave in her a discretion so that, if Samuel Rajaratnam or either of the others turned out to be unsatisfactory, the widow undoubtedly on the true construction of this document would be justified in saying "you will not get a penny." Then it is said that the language which she herself used implied that she thought she was acting under a power. I suppose the idea of the power was put into her head by Chelliah or John Stuart, a clergyman of the United Free Church Mission. I do not suppose they knew much more about powers than I do. I find that although, as I say, she purported to act under what is described as a power, the language she used is quite categorical : "I hereby bequeath the properties (that is, all the properties devised by Shangu Pillai and) inherited by me from my late husband along with my own properties." Who reading that language, if what was in her mind was relevant and material, which I very much doubt, can come to any other conclusion than that this woman believed that she had an absolute power to dispose of this property though no doubt she would in all probability have endeavoured to respect the wishes of her late husband ? In my opinion this is the most satisfactory solution of the case and the one which keeps us most in the domain of realities and

does not seek to apply technical rules of construction which are well enough in the case of instruments drawn by professional people who know exactly what language is apt to express the rules of construction laid down in the English cases to a Tamil document drawn by a person who knows nothing of the rules or their application.

This appeal fails and must be dismissed with costs.

Krishnan, J.

Krishnan, J. :—I agree with the learned Chief Justice that this appeal fails. I confess that I had some doubt in the beginning as to the interpretation to be put upon the will. But after hearing the Administrator-General for the defence, I am quite clear that it is not possible to hold on the construction of the will of Shangu Pillai that his wife got only a life-estate under it. The learned Judge says that the words "should enjoy and should, at her death, divide and give" coupled with the fact that there are no words of absolute disposition in the will suggest to his mind that the testator did not intend that his widow should do what she liked with the properties. In the first place it seems to me that there is a misapprehension here because the opening words of the will do amount to an absolute disposition in favour of the widow. It says :—" I hereby give away to my second wife all the moveable and immoveable properties I possess." The use of the word ' enjoy ' in the second sentence does not connote to my mind that the absolute estate given in the first sentence was cut down to a life-estate. Enjoyment of property is possible not only for a life-estate holder but also for an absolute estate holder. In fact, both enjoy the property equally and, so far as enjoyment goes, there is no difference between the two. The absolute estate holder will no doubt have powers of alienation which the life-estate holder will not have. Then there are the words "she should at her death divide and give to these three persons." No doubt these words require some consideration ; but I think that these words cannot be used as cutting down the absolute estate, for it is left entirely to the wishes of the lady under the will, to give as she liked. That seems to show that the matter was left entirely to her discretion and that there was no binding disposition of the property in favour of the three persons named. It is a mere matter of recommendation to the lady to do whatever the testator would have liked to be done with his property at the time of her death.

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Krishnan, J.

A case very similar to this has been cited by the Administrator-General, *In re, Hamilton* (1) and Lord Justice Kay's observations there are quite apt and applicable to this case. There are no words here to show that the testator intended that the three persons named, should get an estate subject to the exercise of a power by the widow. In fact it is not a case at all of any power of appointment. It is merely a case of absolute bequest to the widow with a recommendation to her, so far as I can understand, to deal with the properties in the manner mentioned which is not binding on her. The use of the word 'power' by the widow in her will is not important. The depositive words are "I hereby bequeath the properties devised by and inherited from my late husband along with my own properties in the manner following." It is only under the second will by the bequest in favour of the plaintiff that he can get any right to the properties; and, as there is no bequest in his favour of the property now in dispute, house No. 27, Venkatesa Maistry Street, he cannot possibly succeed.

The appeal should therefore be dismissed with costs.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Balaram Paramsukdass Firm ... *Appellants** (*Defendants*)

v.

Gudiyatam Govinda Chetty ... *Respondent* (*Plaintiff.*).

Balaram Paramsukdas Firm v. Govinda Chetty.

Contract Act, S. 55—Time of essence of contract—Silver—Contract for purchase of—Time if of essence of—Custom altering date fixed for delivery—Proof of—Onus—Quantum.

In a contract for the purchase of silver, whose price, according to the evidence, varies not only from day to day, but from hour to hour, time is of the essence of the contract. And when a custom is pleaded by which, in cases in which the date fixed for delivery is the Pournami day, delivery need not be made until some days subsequently, the custom, being at variance with the actual term of the contract, must be definitely pleaded and proved.

Held, that such a custom which had been pleaded in the case had not been made out.

Appeal against the decree of the Court of the City Civil Judge, Madras, in O. S. No. 41 of 1921.

* C C C Appeal No. 60 of 1922. 19th February, 1925.

1. (1895) 2 Ch 370.

S. G. Rangaramanujam and *S. G. Sadagopa Mudaliar* for appellant.

V. Radhakrishnayya for respondent.

The Court delivered the following

JUDGMENT :—In this case the respondent entered into a contract with the defendants for the purchase of silver to be delivered at Bombay on the 25th of February, 1918. The plaintiff did not apply for delivery on that date and accordingly on the 28th of February the defendants wrote Ex. B in which they stated that the respondent, having been unable to pay the money due under the contract, had offered to pay interest at 9 per cent. and had failed to take delivery in spite of repeated requests. The respondent was, therefore, asked to take delivery and pay the money. The last sentence in the letter is : " Failing immediate payment of the said amount and obtaining delivery of the goods, my clients will institute a suit against you." A reply to this letter was sent on the 2nd of March—Ex. D—in which the respondent pleaded a custom according to which he was not bound to take delivery until eight days after the contract date, *i. e.*, Pournami day. The defendants then treated the contract as at an end and sold the silver. On the 4th of March the plaintiff wrote and said that he was applying for delivery, and it would appear from a telegram filed as Ex. F that delivery was then refused.

The real question at issue here is whether there is a custom that, when the date fixed for delivery is the Pournami day, delivery need not be made until some days subsequently. The custom pleaded is one said to be prevalent in the Bombay market and whether it is applicable to a contract entered into by Madras merchants is somewhat doubtful, unless these merchants intended to be guided by the Bombay custom ; but, as this point has not been taken by the appellants at the trial and there is really insufficient evidence to decide it, we have to consider whether the custom pleaded exists in the Bombay market. The contract being for the purchase of silver, whose price, according to the evidence, varies not only from day to day, but from hour to hour, it would appear that time is of the essence of the contract, for, when a time is fixed for the delivery, that time might be very advantageous to one party whereas a day later or earlier might be very disadvantageous. As pointed out in *Doloret* v. *Rothschild* (1), in such contracts

1. 57 E R 233.

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time undoubtedly is of the essence of the contract. That being so, the alleged custom put forward by the respondent is a custom which is at variance with the actual term of the contract, *viz.*, the custom alters the date fixed for performance; and in such a case it seems to me essential that there must be a definite custom pleaded and proved. In the plaint the plaintiff alleges that the custom is to extend the time by eight days. In his evidence as P. W. 1 he states that delivery may be taken either on the 8th or the 10th day after Pournami. This is not the same custom as appears in the plaint. P. W. 2 says that delivery can be taken for ten days after Pournami, and P. W. 3 also says the same. P. W. 4 says that delivery can be taken in 8, 9 or 10 days. If the custom pleaded had been for ten days, it might perhaps be said that there was a certain amount of unanimity in the evidence, but the plea being that eight days' grace are customary it is not at all supported by evidence that there is such a custom for ten days. When the price is fluctuating from day to day, there may be a very considerable difference in the prices on the 8th and the 10th day respectively. The evidence goes to establish a custom which is not pleaded in the plaint. Apart from that, the witnesses who speak to the custom are all apparently big merchants who deal in silver, but they all admit that their account-books will not show any evidence of this custom. They have had contracts for Pournami day and it should not be difficult to show that in the case of some of these contracts at any rate advantage was taken of the alleged custom to give delivery after the due date. There is not a scrap of documentary evidence to prove the custom which rests on this oral evidence alone. As against this, a witness examined in Bombay on commission states that there is not this custom and he produces accounts which show damages on bars of silver for the "Mahasuddha" settlement. It is not quite clear what this witness exactly means, but it would appear that there is an entry of damages in respect of one of these contracts. No doubt, the defendant's agent as P. W. 2 states that the plaintiff can take delivery four or five days later, and we see that in Ex. B he does give the plaintiff an opportunity of taking delivery after the due date; but as that notice demanded immediate payment, it cannot be said to have extended the time up to the date on which the plaintiff applied for delivery. I cannot agree with the learned Judge that this custom which is at variance with a very important term of the contract has been

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made out. If it has not been made out, the defendants have committed no breach. Consequently the plaintiffs' suit must fail and is dismissed with costs throughout.

A. S. V. *Suit dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

The Official Receiver of Coimbatore ... *Appellant** (*Petitioner*)

v.

Palaniswami Chetti *alias* Ponnuswami Chettiar and another ... *Respondents* (*Respondents* 1 *and* 2).

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Provincial Insolvency Act, Ss. 4, 28, 51, 53, 54—Mortgagor—Adjudication as an insolvent—Suit to enforce mortgage—Right of mortgagee to institute or to continue—Effect of adjudication on—Petition by Official Receiver under S. 53—Effect of, on jurisdiction of Civil Court to entertain or to try suit on mortgage—Stay of civil suit—Application to Insolvency Court for—Maintainability—Remedy of Official Receiver in such cases—Civil Procedure Code, S. 10—Applicability.

The respondents, who were secured creditors of a person who had been adjudicated an insolvent by the District Court of Coimbatore, filed a suit in the Sub-Court of Coimbatore to enforce their mortgage, adding the Official Receiver as a party to the suit. The Official Receiver applied to the District Court under S. 53 of the Provincial Insolvency Act for getting a declaration that the mortgage in favour of the respondents was void against him, and, pending the disposal of his application, he moved the District Court under S. 10 of Civil Procedure Code for stay of proceedings in the respondents' suit. The District Judge held that S. 10 of the Civil Procedure Code had no application to the case and dismissed the petition for stay. The application for stay was made in the insolvency petition and therefore it was made to the District Court exercising insolvency jurisdiction.

Held, that the order of the District Judge refusing to stay proceedings in the respondents' suit was right.

The right of a secured creditor either to commence a suit or to proceed with the suit and to proceed with the execution of his mortgage decree is not taken away by the admission of an insolvency petition, or by the adjudication of the mortgagor as an insolvent. The jurisdiction of the Civil Court to try a mortgage suit is not taken away on the presentation of an application to the Insolvency Court under S. 53 of the Provincial Insolvency Act. The proper course in cases where a civil suit is pending on a mortgage and where the Official Receiver applies to the Insolvency Court for a declaration that the mortgage is bad under S. 53 of the Provincial Insolvency Act would be to have

*A A O No. 232 of 1924. 7th January, 1925.

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the proceedings in the suit stayed till the disposal of his application by the Insolvency Court.

Procedure in cases where a decree is passed on foot of the mortgage in a civil suit brought to enforce it and where the mortgage is declared to be void under S. 53 of the Provincial Insolvency Act.

Appeal against the order, dated 3rd April, 1924, of the District Court of Coimbatore in I. A. No. 161 of 1924 in I. P. No. 102 of 1921.

A. C. Sampath Aiyangar for appellant.

T. M. Krishnaswami Aiyar for respondents.

The Court delivered the following

Devadoss, J.

JUDGMENTS :—*Devadoss, J.* :—This appeal is by the Official Receiver of Coimbatore against the order of the District Judge refusing to stay proceedings in O. S. No. 11 of 1924 on the file of the Principal Sub-Court, Coimbatore, pending the disposal of I. A. No. 161 of 1924. The respondents who are secured creditors filed O. S. No. 11 of 1924 in the Principal Sub-Court of Coimbatore against the insolvent. The Official Receiver was added as a party inasmuch as the defendant had been adjudicated an insolvent in I. P. No. 102 of 1921. The Official Receiver, who had information that the mortgage in favour of the respondents was a voidable transaction under S. 53 of the Provincial Insolvency Act, moved the District Court for declaring that the mortgage was void against him. Pending the disposal of his application he moved the District Court under S. 10 of the Civil Procedure Code for stay of the proceedings in O. S. No. 11 of 1924. The District Judge held that S. 10 did not apply to the application and dismissed it. The application was made in the insolvency petition and therefore it was made to the District Court exercising insolvency jurisdiction. There is no provision in the Provincial Insolvency Act corresponding to S. 18 of the Presidency Towns Insolvency Act empowering the Insolvency Court to stay proceedings pending against the insolvent before that Court or any other Court subject to the superintendence of that Court. S. 29 of the Provincial Insolvency Act gives power to the Court before which a suit or other proceeding is pending against a debtor, to stay the proceeding or to continue it on such terms as the Court may impose on proof that an order of adjudication has been made against the debtor. It is open to the Sub-Court of Coimbatore to stay the proceedings in O. S. No. 11 of 1924 pending the disposal of the applica-

tion to the District Court by the Official Receiver under S. 53 of the Act. The order of the District Judge, therefore, is right.

It is contended on behalf of the appellant that, on the making of the application by the Official Receiver under S. 53 of the Provincial Insolvency Act, the Civil Court in which the suit is pending against the insolvent ceases to have jurisdiction over the suit ; in other words, the jurisdiction of the Civil Court to try the suit is taken away the moment an application is made by the Official Receiver for a declaration under S. 53 of the Provincial Insolvency Act. The contention of the appellant is that S. 28 is subject to the provisions of S. 53 of the Act. Under S. 28, cl. 6, a secured creditor is exempted from the operation of S. 28. It is contended for the appellant that this must be read subject to the provisions of S. 53. This contention is, on the face of it, untenable. Under S. 28, cl. 2, on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a Receiver as hereinafter provided...........and no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose. In the case of a creditor he cannot commence or prosecute in respect of his debt without the leave of the Court. But cl. 6 is clear in its terms : "Nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it if this section had not been passed." It would be imputing absurdity to the legislature to hold that cl. 6 of S. 28, which is so clear in its terms, should be read as meaning that the secured creditor could not file a suit for recovering the amount secured on the property of the insolvent. The word "creditor" in cl. 2 means only creditor as defined in S. 2 (*a*) of the Act and does not include secured creditor.

Mr. Sampath Aiyangar's contention is that under cl. 6 of S. 28, a creditor can only realise his security by private sale or transfer the security to some other person, and he cannot file a suit for recovering the amount secured. This contention is, on the face of it, untenable, for under S. 69

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of the Transfer of Property Act the right of private sale can be given to a mortgagee, where the mortgage is an English mortgage to which transaction neither a Hindu, Mahomedan, or Buddhist, or a member of any other race, sect, tribe or class, from time to time specified in this behalf by the Local Government with the previous sanction of the Governor-General in Council, in the local Official Gazette is a party; where the mortgagee is the Secretary of State for India in Council; and where the mortgaged property or any portion thereof is situate within the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, the power of private sale of the mortgage can be exercised by the mortgagee, and in no other case can the power of sale in a mortgage be exercised by the mortgagee; in other words, the provisions of S. 69 do not apply to mortgages in the mofussil except in the case of an English mortgage as above described and except in the case of a mortgage in favour of the Secretary of State for India in Council. It therefore follows that S. 28, clause 6, which is applicable only to the mofussil, could not be said to refer to the right of a mortgagee to effect private sale of the property. The word "realise" must be understood in the ordinary sense of a secured creditor realising his security by a suit. The right of a secured creditor to institute a suit or to proceed with the suit already commenced is not taken away by S. 28 by reason of the adjudication of the mortgagor as an insolvent. S. 51 of the Act throws light upon this question. S. 51, clause 1 is "where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition." Clause 2 says: "Nothing in this section shall affect the rights of a secured creditor in respect of the property against which the decree is executed." It therefore follows that, in the case of an ordinary creditor, he will be entitled to the assets realised in execution of his decree if the assets are realised before the admission of the insolvency petition. But, in the case of a secured creditor, he could proceed with the execution of his mortgage decree even after the admission of the insolvency petition and will be entitled to the sale proceeds of the mortgaged property notwithstanding the pendency of the insolvency proceedings. It is not necessary that the executing creditor in order to get the fruits of the execution proceedings should have sold the property before the admission

of the insolvency petition. His right to proceed with execution till he realises the amount due to him is not taken away by the admission of an insolvency petition. It is therefore clear that the right of a secured creditor either to commence a suit or to proceed with the suit and to proceed with the execution of his mortgage decree is not taken away by the admission of an insolvency petition, or by the adjudication of the mortgagor as an insolvent.

The contention for the appellant is that the proper forum for the determination of the questions arising under S. 53 is the Insolvency Court, and therefore the Civil Court cannot proceed with the mortgagee's suit against the insolvent. For the determination of questions arising under Ss. 53 and 54, no doubt the proper forum is the Insolvency Court. In a suit on a mortgage in the Civil Court questions arising under Ss. 53 and 54 would be out of place. The ordinary Civil Court is only concerned with the question whether the mortgage document was executed by the mortgagor and whether the whole or portion of the consideration passed; and if the Court finds that the mortgage deed was executed by the mortgagor and that consideration passed, it will pass a decree in favour of the mortgagee for the amount of consideration which is proved to have passed; and the onus of proving want of consideration in such cases is upon the mortgagor. In the case of S. 53, if the mortgage is within two years of the adjudication of the mortgagor as an insolvent, the onus of proving good faith and valuable consideration is on the mortgagee. The Insolvency Court, therefore, is the proper Court for considering whether the transaction is bad under S. 53 of the Act. Vide *Mariappa Pillai* v. *Raman Chettiar* (1).

The question for determination is whether the jurisdiction of the Civil Court to try a mortgage suit is taken away on the presentation of an application to the Insolvency Court under S. 53 of the Act. There is nothing in the Insolvency Act itself to support the contention that the jurisdiction of the Civil Court to try the mortgage suit is taken away. The Principal Sub-Court of Coimbatore being seized of O. S. No. 11 of 1924 has jurisdiction to try the suit. It is urged that if it passed a decree in favour of the plaintiffs, and if afterwards the District Court holds that the transaction in favour of the respondents is void under S. 53, there will be

1. (1918) I L R 42 M 322.

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a conflict of decisions. The Principal Sub-Court could pass a decree in favour of the plaintiffs if the defendant fails to prove want of consideration. If it finds that the mortgage was executed by the defendant, it is not open to that Court to consider whether the transaction is bad under S. 53 of the Provincial Insolvency Act ; and the Official Receiver would not be able to put forward such a contention in that Court. No doubt, the ordinary Civil Court would have power to declare a mortgage void under S. 53 of the Transfer of Property Act. But it cannot do so under S. 53 of the Provincial Insolvency Act. It is urged for the appellant that in order to avoid a conflict, it must be held that the ordinary Civil Court ceases to have jurisdiction to entertain a suit on a mortgage or to continue the suit the moment an application is made under S. 53 of the Provincial Insolvency Act for a declaration that the transaction is void against the Official Receiver. It does not follow that because a transaction is void under S. 53, therefore, the mortgagee has no remedy against the mortgagor. The transaction under S. 53 is only voidable and not void. It is well settled that till the transaction is set aside it is good against the mortgagor. It is only in the interests of the general body of creditors a transaction which is good against the mortgagor is set aside under S. 53. The jurisdiction to set aside a transaction which is good against the mortgagor, but not good against the general body of creditors is an exclusive jurisdiction of the Insolvency Court. But that does not take away the jurisdiction of the Civil Court to proceed with the mortgagee's suit to decree. If the mortgaged property is of considerable value and if the transaction is bad under S. 53, it is voidable only to the extent of the debts which the mortgagor has to pay. The mortgagee will be entitled to proceed against the mortgaged property after it has satisfied all the creditors of the insolvent ; in other words, a mortgage which is voidable under S. 53 is only voidable to the extent to which the property transferred is necessary to satisfy the creditors of the insolvent. That being so, it is difficult to understand how the Civil Court is deprived of its jurisdiction by reason of an application under S. 53 of the Provincial Insolvency Act. If a declaration is given by the Insolvency Court in favour of the Official Receiver, the property would vest in the Official Receiver and he could dispose of it for the general body of creditors, and the mortgagee could not bring the property to sale on the strength of his mortgage, for the moment the transaction is declared void

under S. 53 the property vests in the Official Receiver and he is entitled to deal with it for the general body of creditors. No Court has power to sell the property of an insolvent if it is vested in the Official Receiver excepting the Official Receiver himself. Vide *Official Receiver of Tinnevelly* v. *Sankaralinga Mudaliar* (2). But till such a declaration is made by the Insolvency Court under S. 53, the transaction is good and the mortgagee could proceed with the suit or with the execution of his decree against the insolvent's property. The Official Receiver's right to proceed under S. 53 is not taken away either by the institution of a suit by the mortgagee or the passing of a decree in his favour or even by his realising the amount due to him by the sale of the property; for the Official Receiver could apply to the Insolvency Court for a declaration that the transaction is void and if he succeeds the property of the insolvent would vest in him before sale in execution of the mortgage decree. If the property is sold to a *bona fide* purchaser for value, before the Insolvency Court passes an order under S. 53, the Official Receiver would be entitled to proceed against the amount realised by the mortgagee in execution of his mortgage decree.

The right of the Official Receiver to proceed against the property of the insolvent is not taken away by reason of any decree of Court. If he could prove that the transfer is without consideration, or is only *benami* for the insolvent, he could recover the property. In the case of S. 54, if payment is made to a creditor which payment is bad as being a fraudulent preference, or if a decree is passed, or if a transfer is made which comes within the mischief of S. 54, the Official Receiver is entitled to proceed against such person who has obtained the benefit, and his right is not taken away by the mere fact of a decree having been passed. In the case of a mortgage, therefore, there is no reason to hold that the passing of a decree would stand in the way of the Insolvency Court passing an order under S. 53. The order of the Insolvency Court under S. 53 would be binding upon the parties; and the ordinary Civil Court would therefore not be able to execute the mortgage decree passed by it. The proper course, in cases where a civil suit is pending on a mortgage and where the Official Receiver applies to the Insolvency Court for a declaration that the mortgage is bad under S. 53 would be to have the proceedings in the suit stayed till the disposal of his

2. (1920) I L R 44 M 524.

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application by the Insolvency Court. It would save time and trouble if the proceedings in the civil suit are stayed pending the disposal of the application under S. 53. But the application must be made either to the Court in which the civil suit is pending or to a Court which has power to stay the proceedings in that suit. There is no warrant either in law or in practice for the contention that the presentation of an application to the Insolvency Court for an order under S. 53 takes away the jurisdiction of the Civil Court to proceed with the suit of a secured creditor.

Under S. 4 of the Provincial Insolvency Act, the Court is given wide powers to try all questions which the Court may deem expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property. Though the Insolvency Court has such wide powers, neither S. 4 nor any other section of the Insolvency Act takes away the jurisdiction of the ordinary Civil Court to try a suit instituted by a mortgagee against the insolvent. The scheme of the Act is to exempt the secured creditors from the operation of the Act unless they choose to come in under S. 47. This does not mean that a mortgage cannot be set aside as being void under S. 53. Similarly the jurisdiction given to an Insolvency Court under Ss. 53 and 54 cannot take away the jurisdiction of the ordinary Civil Court to entertain a suit at the instance of a mortgagee, or proceed with such a suit already instituted by reason of the pendency of the insolvency proceedings.

In the result the appeal fails and is dismissed with costs.

Wallace, J.

Wallace, J.:—The point in this case is whether, when a mortgage has been attacked by the Official Receiver in insolvency proceedings under S. 53 of the Provincial Insolvency Act as a voidable transfer, the Civil Court in which the mortgagee is suing his insolvent mortgagor represented by the Official Receiver to enforce that mortgage must or should stay proceedings therein and hold that suit as subject to the decision which will be given in the insolvency enquiry. Before us the appellant went so far as to contend that the Civil Court lost jurisdiction to continue the civil suit whenever the Official Receiver had initiated proceedings in the Insolvency Court, which would imply that the proper order is not so much a stay of trial as a dismissal of the suit, since if the Civil Court lost jurisdiction to go on with the trial, it equally lost jurisdiction to pronounce a judgment in the suit. On the other side it was contended that the scope of the two

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proceedings is so essentially different that the Civil Court does not lose jurisdiction and that there is no reasonable ground for staying its hand.

The theory that a Court may *pendente lite* be deprived of jurisdiction by some proceeding in some other Court is somewhat startling and would require very strong reasons for support. The appellant appeals to S. 28, sub-section 2 of the Provincial Insolvency Act, which says, " On the making of an order of adjudication, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose. " To begin with, this does not in terms prohibit a continuation of a suit already begun, and if the sub-section is to be applied to such a case, then such a continuation must come under the general head of remedy against the property of the insolvent. This I doubt very much. It has been held that the leave here contemplated must be obtained before the suit is filed and cannot be granted after the suit is filed. [See *In re Dwarkadas Tejbhandas* (3)]. If so, then leave cannot be given to continue a suit already filed. But assuming without deciding that the general policy of the Act will support such an interpretation, the creditor who is estopped by the sub-section is one whose debt is provable under the Act, and the sub-section is subject to sub-section (6), " Nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security, in the same manner as he would have been entitled to realise or deal with it if this section had not been passed." Do these two clauses prohibit or permit the secured creditor to continue or commence a suit on his security during the pendency of the insolvency proceedings ? As I have said, the point should not be found against the *bona fide* litigant unless it was obviously the intention of the statute to deprive him of his ordinary civil remedies.

It will be noted first that the prohibition announced is not absolute but discretionary with the Court. Therefore the leave of the Court may be given to a mortgagee to commence or continue his mortgage suit *pari passu* with the pro-

3. (1915) 17 Bom. L.R 925.

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ceedings under S. 53 of the Act, which clearly implies that there can be no inherent conflict of jurisdictions. It would be absurd to lay down that the Court may give leave to conduct a proceeding wholly without jurisdiction. The terms of sub-section (6) are quite general and there is no reason to conclude that the section as a whole was intended to deprive a secured creditor from enforcing his security. The general policy of the Act does not deal with the secured creditor. He may or may not choose to come on the schedule of creditors. He has the option (*see* S. 47) of coming in or enforcing his security, and the Official Receiver is in the case of a *bona fide* mortgage bound by it, apart from the insolvency proceedings altogether, because none of the mortgagee's interest really vests in him at all, and the Official Receiver is bound to discharge a *bona fide* mortgage debt even when the mortgagee has not come on to the schedule. [See *Shridhar Narayan* v. *Atmaram Govind* (4), *Shridhar Narayan* v. *Krishnaji Vithoji* (5), *Sheoraj Singh* v. *Gauri Sahai* (6) and *Haro Pria Dabia* v. *Shama Charan Sen* (7)]. In the last case it was held that a judgment-creditor holding a decree for sale on a mortgage is entitled to enforce that decree whether or not his debt is on the schedule. This is wholly opposed to the appellant's theory that S. 28 would bar a secured creditor from such a remedy. The case in *Gauri Datt* v. *Shankar Lal* (8) is not in point as it was not a case of a secured creditor. It is hardly likely that the legislature would intend to prohibit a judgment-creditor from enforcing a right which binds the insolvent and therefore the Official Receiver and all the other creditors.

If, therefore, S. 28 does not prohibit a *bona fide* mortgagee from enforcing his mortgage right during the pendency of the insolvency proceedings, it is difficult to see why the mere fact that the Official Receiver is attacking the *bona fides* of the mortgage should bring S. 28 into operation. S. 28 itself draws no such distinction. If in terms it does not apply to a *bona fide* mortgagee, it does not apply to any mortgagee. I hold therefore that S. 28 (2) is subject to sub-section (6) and that sub-section (2) does not in any way affect the right of a secured creditor to proceed with his suit to enforce his security.

S. 4 of the Provincial Insolvency Act does not help the appellant. It is a section chiefly to settle questions of title to

4. (1883) I L R 7 B 455.
5. (1887) I L R 12 B 272.
6. (1899) I L R 21 A 227.
7. (1889) I L R 16 C 592.
8. (1892) I L R 14 A 358.

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property between the debtor and a third party. Nor does S. 41 of the Indian Evidence Act assist in view of the limited nature of the enquiry under S. 53. The decision in *Mariappa Pillai* v. *Raman Chettiar* (1) also does not really help the appellant. I do not think that that decision laid down anything more than that the Civil Court has no jurisdiction to decide a matter which falls to be decided under S. 53 of the Provincial Insolvency Act, that is, it cannot annul in favour of creditors a transfer of the nature set out in that section. The case in *Official Receiver, Tinnevelly* v. *Sankaralinga Mudaliar* (2) was not a case of a secured creditor, as specifically found at page 530. It was decided on the footing that the vesting order of the Insolvency Court placed the property of the insolvent at once in the hands of the Official Receiver and prohibited any other Court than the Insolvency Court from dealing with it in any way. This has no application to the present case of a secured debt.

The matter will be made clear by considering the nature of the proceedings under S. 53 which has been ably put before us by Mr. T. M. Krishnaswami Aiyar to whom I am much indebted. S. 53 implies an attack by the Official Receiver on behalf of the general body of creditors, and the remedy which he is entitled to get on proving his case is that the transfer is voidable against him and may be annulled by the Court ; that is, in the case of a mortgage the property mortgaged will be available as the property of the insolvent for the general body of creditors, who are entitled to be repaid their debts out of it. It does not really affect the relationship of the transferor and transferee as mortgagor and mortgagee. For example, if the property is sold by the Official Receiver and the creditors and costs are fully paid out of the proceeds and there is a surplus remaining, that surplus belongs *prima facie* to the transferee and not to the transferor, and is his unless the transferor has by appropriate proceedings established his right to it. The proceedings under S. 53 will not establish that right. Clearly in these proceedings the Official Receiver cannot represent the debtor. Otherwise he would have to admit the transfer unless the debtor could challenge it extraneously on some such ground as fraud or undue influence. The relationship between the mortgagor and mortgagee remains unaffected by any proceedings under S. 53, and the mortgagee

1. (1918) I L R 42 M 522. 2. (1920) I L R 44 M 524.

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is entitled therefore to enforce his mortgage against the mortgagor except so far as proceedings under S. 53 may have held the property mortgaged as assets of the mortgagor at the disposal of the general body of creditors.

There is nothing therefore in these proceedings to interfere with the ordinary suit of the mortgagee to enforce his mortgage. Such a suit only declares and enables him to enforce his right against his mortgagor and has nothing to do with that mortgagor's creditors who are not and could not be proper parties to such a suit. It is in fact not open to the Official Receiver, in the mortgage suit, as the representative of the judgment-debtor, to challenge the validity of the mortgage on any ground which the judgment-debtor himself could not put forward. He is not brought on in such a suit as representative of the creditors at all. Obviously, for example, he could not challenge the passing of the consideration as that is not a point relevant to that suit, and the frame and scope of the suit cannot have been altered merely because the Official Receiver has been brought on as representative of the judgment-debtor. The Official Receiver does not carry into that representation his character as representative of the creditors. The decree in the mortgage suit, if in favour of the mortgagee, will still be enforceable except so far as the proceedings under S. 53 have debarred him from recovering the whole of the proceeds for himself, and if, for example, in the proceedings under S. 53 the Court finds the alienation good to any extent, and upholds it to that extent, or rather does not challenge the mortgage right to that extent, then the mortgagee will become a creditor of the insolvent estate on the foot of his mortgage to that extent. If the mortgagee's suit is dismissed, then the property vests in the Official Receiver who is on record in his suit as representative of the mortgagor. Similarly, if the proceedings under S. 53 are dismissed, the mortgage suit is unaffected ; if they are upheld, the mortgagee's rights against his mortgagor are subject to the result of the order against him under S. 53. The two Courts are in fact deciding different questions in relation to different parties and there is therefore no question of concurrent or conflicting jurisdiction on the same point.

There is no reason therefore why the mortgagee's suit should be stayed because proceedings under S. 53 are filed or pending. The result of such proceedings would affect only the execution of the decree in the mortgage suit, since the mort-

The Official Receiver of Coimbatore v. Palaniswami Chetti. Wallace. J.

gagee cannot be permitted to sell the property for himself if there is an adverse order under S. 53. The real conflict in the two proceedings does not materialise until the question arises, who is to sell the property? Then the decision in the proceedings under S. 53 will bind the mortgagee by force of S. 4 of the Provincial Insolvency Act and the sale will be by the Official Receiver and the proceeds must be primarily held at the disposal of the Official Receiver. As the Official Receiver is already a party *ex hypothesi* to the mortgage suit, there will be no trouble about that. It would be the duty of the Court executing the mortgage decree to give effect under S. 4 of the Provincial Insolvency Act to the decision in the insolvency enquiry. The principle that the interest of the particular creditor must give way to that of the general body of creditors is thus not in danger.

I agree therefore with my learned brother that there is no reason shown for stay of the civil suit and agree in the order proposed by him.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice*, AND MR. JUSTICE KRISHNAN.

B. Parthasarathy Chetty & Co. ... *Appellants** (*Defts.*)

v.

T. M. Gajapathi Naidu & Co. ... *Respondents*

Parthasarathy Chetty & Co. v. Gajapathi Naidu & Co.

Contract—Sale of goods—Breach in accepting goods—Re-sale in pursuance of term in the contract—Fall in prices—Suit for loss incurred on re-sale—Goods sent not corresponding to goods ordered—Effect of—Rights of parties.

The defendants commissioned the plaintiffs to get them fireworks from Europe and the contract provided that the bills for the same should be accepted on presentation and paid at maturity. Then followed a clause, "Should we fail to accept the bills we hereby authorise you to dispose of the goods on our account and risk without notice and we bind ourselves to make good any loss or deficiency that may arise from such sale." The defendants refused to accept certain drafts and thereupon the plaintiffs took possession of the goods and sold them after about a year, by which time the prices had fallen down. They then sued the defendants for the loss incurred by such re-sale.

It appeared from the evidence that while the order was for three lots each of a different sort specified in the contract, all the goods actually sent were of the same sort. *Held*, (1) the plaintiffs were not justified in unreasonably delaying before they re-sold the goods; and (2) before they could substantiate a claim for loss incurred on re-sale, they must show that the goods which they

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*O S Appeal No. 1 of 1923. 21st January, 1925.

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purported to re-sell and had re-sold were goods which the defendants would have been obliged to take under the terms of the contract but failed to do so. *Braithwaite's case*, L. R. (1905) 2 K. B. 543 considered.

On appeal from the judgment of the Hon'ble Sir Walter Salis Schwabe, Chief Justice, dated the 11th October, 1922, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 162 of 1921.

K. Rajah Aiyar, P. Krishnamachari and *V. Krishnan* for appellants.

V. C. Gopalaratnam for respondents.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS :—*The Chief Justice* :—If I had not the misfortune to differ from my learned predecessor who tried this case, I should myself have thought this matter to be a reasonably clear one. The plaintiffs are persons who were buying goods from foreign merchants in Europe on the demands of persons in the position of the defendants and in this case the defendants commissioned the plaintiffs to get them some fireworks from Europe on certain conditions. The contract is a confused document but the clauses that we are primarily concerned with apparently are reasonably clear. The contract provided for the drawing of bills against invoices and I will take it for purposes of argument that this was in effect a C. I. F. contract. The invoices came to hand with the documents and drafts attached. The terms of payment are these : "We authorise you to draw upon us for the total amount of invoice at the sight mentioned below at current rate of exchange and such bill or bills we hereby bind ourselves to accept on presentation and pay at maturity." That is the material clause. Then lower down comes this, " Should we fail to accept or to pay at maturity such bill or bills or to pay cash as before agreed we hereby authorise you to dispose of the documents or goods either by private sale or by public auction on our account." The contract was on the 6th May, 1920 and the goods came through in about the following October and the specification of the goods provided for by the contract was " 30 cases of wonder candles, offer No. 383, each label 10 cases, in all three designs." Then there was a further order for five lots of two cases of different classes of goods and we are only concerned with one of these because the others were not shipped. The contract provides that the plaintiffs are to be at liberty to execute the order in something less than its entirety. The invoices specify the two cases of goods as " wonder candles coloured

as per my offer 383, 9cm. burning" and the 30 cases as "wonder candles (electric sparkles) white as per my offer 383, 9'cm. burning." The defendants were obviously bound on receipt of the shipping documents, if they were in order, to accept the drafts that were forwarded through the Mercantile Bank. They refused to do so and they justified their refusal on the ground that the invoice was silent as to the provision that the 30 cases should have been divided into three lots of 10 cases each containing a different design and that that ought to have appeared on the face of the invoice. This case has been discussed on the footing that that was not a reasonable rejection and that there was nothing in the invoice to warrant them in refusing to accept the drafts. Therefore the position was that on the date when they refused to accept these drafts in October they were in breach and the defendants have been sued for the consequences of that breach. The goods were taken over by the plaintiffs and in August, 1921, they were sold, and sold at a very great drop in value. In the first place, it is very evident that the plaintiffs could not possibly go on indefinitely holding goods of this kind, goods of a perishable nature and goods which are only in vogue at certain seasons in the year, and apparently the season in India is not very different from the season in England, the months of November and December. But there was a much more fundamental flaw in the plaintiffs' goods than that. It proved on the evidence that satisfied the learned Chief Justice to be a fact that, when the goods were examined, instead of being divided into three lots each with a different label specified in the contract, all the 30 cases were the same. The finding of fact is challenged by the plaintiffs-respondents. But we have gone through the evidence very carefully. Mr. Gopalaratnam has taken us through it—and our opinion is that the only witness who is clear or specific about the matter and who seemed to know what he was talking about is D. W. 6, Govindasami Chetti, who is quite explicit and the more he was cross-examined about it the more clearly did he adhere to the story that he gave that he had seen all these goods and that they were all marked with the same labels. It is suggested that the state of the law about the sale of goods is this, that, if there is a breach of contract which is unwarranted and cannot be supported the buyer who rejects the goods cannot be heard to say thereafter that in truth and in fact the goods were in such a state as would have justified him in rejecting them on the actual ground

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of their quality even though he took and falsely took some other ground of rejection. That may or may not be a scope of *Braithwaite's case* (1), and I note Lord Sumner in the House of Lords while confining *Braithwaite's case* strictly to that case seemed very doubtful as to whether even that was not too wide a proposition to put forward. But I notice that in *Braithwaite's case* when it came to the measurment of damages it is clear that the inferior quality of the timber in that case, though it was not allowed for the defence to say that it entitled them to reject and that therefore there could be no damages, was clearly taken into account, and having ascertained the difference between the market and contract price, allowance was made for the deficiency of the quality of the timber tendered. What is the position in this case? In this case, the plaintiffs claim not damages based on the market price in which case the principle of *Braithwaite's case* (1) might intervene to prevent Mr. Grant saying, " Oh, you cannot get any damages here because your goods were not only not as warranted but there was a complete breach of the condition of description and you were in fact selling other goods. " Let it be assumed that *Braithwaite's case*(1)would carry Mr. Gopalaratnam so far and Mr. Grant could not set up that defence. But here there is no claim for the difference between the market price and the contract price. The claim here is in the terms of the contract. We sold the goods and we could debit you with the loss that we suffered, the difference between the actual sale price and the contract price. What is the clause ? The clause is this, and I am quoting only the material words : " Should we fail to accept the bills we hereby authorise you to dispose of the goods on our account and risk without notice and we bind ourselves to make good any loss or deficiency that may arise from such sale. " What does that mean ? It means that if the defendants default in accepting the bills, the plaintiffs have the power to re-sell all *the goods*. What is meant by *the goods* ? Obviously the goods that corresponded to the description in the contract. Supposing that instead of being filled with fireworks the cases were filled with shavings, is it possible for a moment to say that the plaintiffs can go into the market and sell the shavings and then come down on the defendants for the price of the fireworks ? We should clearly be exceeding the scope of the doctrine in *Braithwaite's case* (1) if we should give effect to so absurd a conten-

1. L R (1905) 2 K. B. 543.

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tion. The plaintiffs have elected to open their mouth for a wider remedy and they have got to prove that the goods that they sold were goods which they delivered or were prepared to deliver in conformity with the contract. Had they sued for the difference between the market and contract price, I think it would be quite possible to state, "Yes. You must get that and you need not prove that the goods really corresponded to what was contracted for. But of course you will have to make allowance for any loss of value caused by the breach of condition, although it is not available as a weapon for the rejection of the goods *in toto.*" It is only fair to observe that the learned Chief Justice did apparently find as a fact that the goods tendered were just as good as the goods contracted for. In that case it might be that if they had sued for the difference between the market price and the contract price and proved it they would have got some damages. However I do not think they would have got very much because the only evidence that was called in went all to show that if the goods had been re-sold on the date of breach or shortly afterwards, far from having depreciated in value, they had appreciated. However, that was done and we cannot allow the plaintiffs to to start a wholly new case on a different basis at this stage. We must, therefore, hold that the plaintiffs have failed to prove their case, that they were not justified in unreasonably delaying before they re-sold the goods in any event and that further in law, before they could substantiate a claim of this nature and on this ground they must show that the goods which they purported to re-sell and had re-sold were goods which the defendants would have been obliged to take under the terms of the contract but failed to do so. The appeal must be allowed with costs here and below.

With regard to the two cases, they stand on exactly the same footing as the others because there never was any opportunity given to see whether the goods on the market would have involved any loss at all and the evidence is just the same as with regard to the other cases. The plaintiffs cannot leave their case in a state of nebulous conjecture. On this part of the case also the plaintiffs fail.

Mr. Grant does not press the counter-claim. The counter-claim will stand dismissed with costs in the appeal.

Krishnan, J. :—I agree and have nothing to add. Krishnan, J.

T. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE KRISHNAN.

Lanka Tulasamma ... *Appellant** (*Plaintiff*)

v.

Guntupalli Venkata Subbayya and others ... *Respondents* (*Defendants*).

Lanka Tulasamma v. Venkata Subbayya.

Trustee—Mixing up of trust funds with private funds—Claim by cestui que *trust—Plea of trustee to funds as his own—Onus of proof of—Quantum—Rule as to—Applicability to persons in position of accountability as trustee.*

Where a trustee, or a person who puts himself in the same position of accountability as a trustee, such as an executor *de son tort*, by virtue of his intermeddling with the estate, is proved to have amalgamated moneys of the testator with his own, and especially if he can reasonably be suspected of having destroyed the evidence which would otherwise be available to separate the two estates, then he is called upon to account for all the sums that he alleges to be his own and to prove his ownership in them. Where there has been such an amalgamation the burden will be passed from the person in the position of a *cestui que trust* .

Appeals against the decree of the Court of the Additional Subordinate Judge of Guntur in O. S. No. 40 of 1918 (O. S. No. 49 of 1918 on the file of the Temporary Sub-Court, Guntur).

K. Kameswara Rao for plaintiff.

V. Suryanarayana for respondents.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS :—*Chief Justice* :—*Appeal No.* 205 *of* 1921 :—The question that arises in this appeal is that raised by the twelfth paragraph of the memorandum of appeal. This was a suit brought by Narasayya's widow to reclaim certain properties and choses in action as being part of her husband's estate though actually in the hands of the defendant, the plaintiff in the adoption suit. The son-in-law, to use a term that will cover him in both the suits, has admitted at page 322 of the record that he adopted a course of business which resulted in his mixing up moneys which he contends are his own with moneys which in some cases he himself says are, and in other cases which are alleged by the other side to be, moneys belonging to the estate of Narasayya. It also appears from page 316 of the record that there are the gravest reasons to suspect, as the learned Judge suspected, that the son-in-law

*Appeals Nos. 205 of 1921 and 393 of 1923. 27th January, 1925.

after the death of his father-in-law had suppressed documentary evidence in the shape of account-books which might have thrown light upon the question as to whose estate these various suggested items in the account belonged to.

The learned Judge appears not to have had his attention drawn to the authorities applicable to a case of this nature. He took the view that the plaintiff having claimed certain specific items of property was bound to give evidence with regard to each item sufficient to make a *prima facie* case that the particular item belonged to the estate of her deceased husband. As we understand the authorities, that is not the law. The law appears to be this, and it has been settled by a long chain of authorities both in England and in this country : where a trustee, or a person who puts himself in the same position of accountability as a trustee, such as an executor *de son tort*, by virtue of his intermeddling with the estate, is proved to have amalgamated moneys of the testator with his own and especially if he can reasonably be suspected of having destroyed the evidence which would otherwise be available to separate the two estates, then he is called upon to account for all the sums that he alleges to be his own and to prove his ownership in them. That was laid down in the leading case of *Lupton* v. *White* (1) and the head-note is this : "Agent, or Bailiff, confounding his principal's property with his own, charged with the whole ; except what he can prove to be his own ; and, in this instance, the case of a breach of the terms, upon which the Court dissolved an injunction, the inquiry was directed with costs." That is clear authority for the proposition that, where there has been such an amalgamation the burden will be passed from the person in the position of a *cestui que trust* . That has been consistently followed in the English Ciurts of Equity, and a comparatively recent application of it will be found in the case of *In re Oatway* : *Hertslet* v. *Oatway* (2) and the doctrine is by no means unknown to India. It was followed in two cases in this Court which have been cited to us—*Magaluri Garudiah* v. *Narayana Rungiah* (3), a decision of Sir Charles Turner, C. J., and Muthuswami Aiyar, J., and more recently in a case decided by Benson and Sundara Aiyar, JJ., *Burugapalli Sriramulu* v. *Nandigam Subbarayudu and others* (4). In those cases the

1. 15 Vesey 432. 2. (1903) 2 Ch. 356. 3. (1881) I L R 3 M 359. 4. (1911) 10 M L J 313.

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principle laid down by Lord Eldon has been fully recognised and acted upin, viz., that the *onus* of proof clearly rests on the person responsible for confounding the two funds and thereby rendering identification difficult on the plaintiff's part.

We therefore think that this case must be referred back for a finding in accordance with the view of the law that we have laid down, namely, that this man must prove that all the items enumerated in paragraph 16, sub-paragraph 4 of the judgment belong to himself, the burden being on him. There is general evidence to lead to a very strong suspicion that this man has got into his hands some considerable portion of the deceased man's estate. There is evidence that it was a large estate at one time, and there is evidence that just a few years before his death it amounted to Rs. 40,000. And there are available sources of evidence which are not before us but can be resorted to by the learned Judge in the Court below as to how much of that estate is now left in the hands of the widow. If there is a deficit after taking into account the sums of money recovered by the Receiver, then the burden will lie upon the defendant. The general principle is clear that this man must show that those items which he alleges to be his own moneys belong to him. It is no great hardship in this case, because the debts are mostly evidenced by promissory notes and it cannot be very difficult, if his case is a true one, to rebut the presumption that they are really notes taken by him in respect of moneys due to Narasayya's estate, by proving that he himself lent the money at a particular date, that it was his own money and that the negotiable security was given to him to secure a debt due to himself and to nobody else. The case must go back for a finding with regard to those items with the *onus* of proving that they are his cast upon the defendant. Both parties can adduce fresh evidence. Finding will be returned in three months. Ten days will be allowed for objections.

Appeal No. 393 *of* 1923 :—This appeal is withdrawn and is dismissed with costs (no Vakil's fee). The respondent will also get her costs in C. M. P. No. 1348 of 1923.

Krishnan, J.

Krishnan, J. —I agree.

A. S. V. *Finding called for.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice*, MR. JUSTICE SPENCER, MR. JUSTICE KUMARASWAMI SASTRI, MR. JUSTICE BEASLEY AND MR. JUSTICE SRINIVASA AIYANGAR.

Ramakrishna Aiyar ... *Petitioner* (Petitioner)*

v.

Sithai Ammal ... *Respondent (Counter-Petitioner).*

F. B.
Ramakrishna Aiyar
v.
Sithai Ammal.

Criminal Procedure Code, S. 195—Amendment—Effect of—Sanction given and complaint filed before 1st September, 1923—Revocation by District Magistrate—Jurisdiction—Change in law—If affects aggrieved party—Substantive right and matters of procedure—General Clauses Act, S. 6.

A Sub-Magistrate gave sanction to X to prosecute Y for an offence under S. 211, Indian Penal Code and on the basis of the same a complaint was filed before 1st September, 1923, when the Criminal Procedure Code Amendment Act came into force. Subsequent thereto, the District Magistrate on a petition presented by Y disallowed the prosecution by revoking the sanction. *Held*, the District Magistrate had jurisdiction to revoke the sanction, as Y had a right under the old Code to get the sanction order revoked by appealing to a superior tribunal. Such a right cannot be taken away by any change in the law as laid down in the amending Act. It was not a matter of mere procedure, but a substantive right to invoke the aid of a higher tribunal and under the well-established rules of construction, such a right is not taken away by an amending Act.

Held also, S. 6 of the General Clauses Act laid down the same principle.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate of Tanjore, dated 4th May, 1924, in C M. P. No. 2 of 1924 preferred against the order of the Court of the Stationary 2nd class Magistrate of Kumbakonam in M. C. No. 9 of 1923.

This case came on for hearing in the first instance before the Hon'ble Sir Victor Murray Coutts Trotter, Chief Justice, and the Hon'ble Mr. Justice Madhavan Nair, and was ordered by the Court to be heard by a Full Bench.

S. T. Srinivasagopalachariar for petitioner.

The Public Prosecutor on behalf of the Crown.

The Court delivered the following

JUDGMENTS :—*The Chief Justice* :—In this case the Sub-Magistrate of Kumbakonam gave leave to the petitioner before us, one Ramakrishna Aiyar, to prosecute the respondent, Coutts Trotter, C. J.

*Cr. R C No. 592 of 1924 17th December, 1924.
(Cr. R. P. No. 529 of 1924.)

F. B.

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Coutts Trotter, C. J.

a woman called Sithai Ammal under S. 211 of the Indian Penal Code for bringing against him a false charge of dacoity. The respondent thereupon went before Mr. Shield, who was the then District Magistrate of Tanjore, and he passed an order on the 11th September, 1923, the new Code of Criminal Procedure having come into force on the 1st of the month. The learned District Magistrate came to the conclusion that there was nothing for him to do. He was asked to revoke the sanction and he said: "I am not going to revoke the sanction, there is nothing in it." It is admitted that the complaint had been filed before the 1st of September, 1923. In that view we have found from the records it was wrong—but that being his view and he presumably not being properly instructed on the facts—he supposed that no complaint had been filed before the new statute came into operation. He first outlines the procedure relating to such a complaint and says it would be regulated by the new Code. In point of fact, as we have already said, he was misinformed about that and the complaint had in fact been filed before the coming into operation of the new Code. Mr. Shield having done nothing, the matter was brought before his successor as District Magistrate of Tanjore, Mr. Hood, and Mr. Hood, after pointing out the incorrect assumption on which his predecessor had acted, disallowed the prosecution and revoked the sanction that was granted, rightly holding that he was not revising the order of his predecessor Mr. Shield, because the petition was not considered by Mr. Shield and there was no order of Mr. Shield to revise. It is now sought to be said before us that that action of Mr. Hood was illegal and without jurisdiction and that the sanction granted by the second class Magistrate of Kumbakonam must stand. It is best to begin with a citation of the material sections of the old and new Codes. Under the old Code of Criminal Procedure, S. 195, the machinery for dealing with certain offences of which the one in question in this case was one that, before the prosecution could be launched, it was an essential condition precedent either that the previous sanction of the Court should have been obtained obviously by one of the parties, or that the Court should *suo motu* make a complaint, and by sub-section (6) it is provided that

"any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate; and no sanction shall remain in force for more than six months from the date

on which it was given, provided that the High Court may for good cause shown extend the time."

The new Code envisages an entirely different state of things and for all practical purposes it abolishes sanction entirely. It provides a substitute, for the condition precedent is not to be sanction but a complaint in writing by the Court before which such proceeding as the matter arose out of is tried or by the Court to which the Court is subordinate. The argument put before us is this, that as the complaint in this case was filed before the coming into operation of the new Code and as the sanction required by the old Code was dispensed with and abolished by the new Code, therefore it abolished the power to revoke the sanction which was conferred by the old Code; and it is said that that must be so, because this power to invoke the Court to interfere with the sanction of the Court below is not a right vested in anybody but a mere matter of procedure. That undoubtedly was definitely held by a bench of this Court in *Nataraja Pillai* v. *Rangaswami Pillai* (1). It is said that there is another authority in favour of the present appellant, which is *Sesha Aiyar* v. *The Public Prosecutor* (2). We do not think that that decision under the circumstances in which it was given really applies to this case at all, because it is quite apparent from the concluding sentences of Mr. Justice Krishnan's judgment, which was the only one that was pronounced in the case, that the Court was under the misapprehension that the prosecution in that case had been launched after the new Code came into force. That is a supposition which we now know to be wrong and we are not prepared to say that we should differ from the decision in the case; but as it was based on an incorrect supposition, the decision is not really before us and does not give us any assistance one way or the other.

What are the principles guiding such matters as this? The line of distinction is very clearly laid down in a series of English cases of great authority which we respectfully follow and the distinction drawn is between a matter of substantive right and a matter of mere procedure. The main cases that have been referred to are *Gardner* v. *Lucas* (3) and *Attorney-General* v. *Siller* (4).

1. (1923) I L R 47 M 384 : 46 M L J 274
2. (1923) 19 L W 463.
3. (1878) 3 A C 582.
4. (1864) 10 H L C 704.

F. B.

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Their Lordships in *Gardner* v. *Lucas* (3) lay down the general principle that rules of procedure are always retrospective in their operation, unless there is good reason why they should not be.

Lord Blackburn says :—

"The general rule not merely of England and Scotland but, I believe, of every civilised nation is expressed in the maxim *Novo constitutio futuris formam impowers debet non praeteritis.'*"

Prima facie any new law that is made affects future transactions, not past ones. Nevertheless, it is quite clear that the subject-matter of an act might be such that though there were not any express words to show it, it might be retrospective. For instance, I think it is perfectly settled that, if the legislature intended to frame a new procedure, instead of proceeding in this form or that, you should proceed in another and a different way, clearly then by-gone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective unless there is some good reason or other why they should not be. Then again I think that, where alterations are made in matters of evidence, certainly upon the reason of the thing, and I think upon the authorities also, those are retrospective, whether civil or criminal.

But where the effect would be to alter a transaction already entered into, where it would be to make that valid which was previously invalid, to make an instrument which had no effect at all, and from which the party was at liberty to depart as long as he pleased binding, I think the *prima facie* construction of the Act is that it is not to be retrospective and it would require strong reasons to show that is not the case. The Lord President has put instances which show the reason and object for this ruling ; we must apply the ordinary rule in considering statutes and say it is not retrospective for such a purpose as this, there being no evidence of an intention upon the face of the language to make it retrospective."

The other rule is best illustrated by the decision of the Privy Council in *Colonial Sugar Refining Co.* v. *Irving* (5) That was a case in which the opinion of their Lordships was delivered by Lord Macnaghten and he lays down the principle in a language so clear that I cannot possibly do better than adopt it.

5. (1905) A C 369.

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"As regards the general principle applicable to the case there was no controversy. On the one hand it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand if it be more than a matter of procedure, if it touches a right in existence at the passing of the Acts, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendments. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pendency action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

There is one other passage which I should like to quote and it is from a judgment of Lord Westburn in the well-known case of *Attorney-General* v. *Siller* (4) and it is quoted in Stroud's *Judicial Dictionary*, 2nd Edition, Vol. I, at page 98:

"The right of appeal is only by statute. It is not in itself a necessary part of the procedure in an action but is the right of entering a supreme Court and invoking its aid and interpositions, to redress the error of the Court below. It seems absurd to denominate this paramount right part of the practice of the inferior tribunal."

Now turning again to the Indian authorities what do we find? The learned Judges in *Nataraja Pillai* v. *Rangaswami Pillai* (1) seem to me to base their observations on the following passage in the judgment of Sir Arnold White, C. J., in *Bapu* v. *Bapu* (6):—

"We think, however, that the power conferred on this Court by S. 195 (6) of the Criminal Procedure Code is not a part of the appellate and revisional jurisdiction of this Court conferred by Chapters 31 and 32 of the Code of Criminal Procedure."

It follows therefore it was concerned with the question of what was the proper procedure. However, the matter is not directly before us, though Sir Arnold White, C. J., was quite right in thinking, that the power conferred was not a part of the appellate revisional jurisdiction under Chapters 31 and 32 of the Code. But that is not the question we have to determine. The question we have to decide is whether this was a right of entering the superior Court and invoking its aid and interposition to redress the error of the Magistrate's Court

1. (1923) I L R 47 M 384: 46 M L J 274. 4. (1864) 10 H L C 704.
6. (1912) I L R 39 M 750 at 768: 22 M L J 419.

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below and therefore it seems to us that, on principle and those very weighty authorities, we ought to hold that this is not a case of procedure but it is a case of a real right to invoke the aid of a higher tribunal. We are also of opinion that those principles are really involved and carried out by S. 6 of the General Clauses Act of 1897, because what that section says is this :—

"Where this Act or any Act of the Governor-General in Council or Regulation made after the commencement of this Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—(*a*) revive anything not in force or existing at the time at which the repeal takes effect; or (*b*) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or (*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or (*d*)................ (*e*) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

That is the shortest method of dealing with this matter, namely, to base our decision on the words of that section, but, as in our opinion a very important legal principle is involved, we have thought it better to state that principle with reference to the pronouncements of the very eminent Judges whose judgments we have quoted. Mr. Srinivasagopalachariar conceded that, apart from the question of jurisdiction he could not argue that Mr. Hood's order was not right in other respects.

The result will be that this petition is dismissed.

Spencer, Kumaraswami Sastri, Beasley, and *Srinivasa Aiyangar, JJ.*—We agree.

T. S. V. *Revision Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE KRISHNAN.

P. Ramiah & Co. ... *Appellants** (*Defendants*)

v.

T. R. Sadasiva Mudaliar & Bros. ... *Respondents* (*Plaintiffs*).

P. Ramiah & Co. v. Sadasiva Mudaliar & Bros.

Limitation Act, Art. 96—Sale of goods—Short delivery—Suit for refund of excess price paid—Limitation when commences—Vendor's vendor an insolvent—Effect of.

*O S Appeal No. 118 of 1923. 19th January, 1925.

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The defendant who purchased some bales of grey shirtings from another, sold the same to the plaintiffs, and then the goods went through a long chain of changing hands. The ultimate purchaser found that some of the bales did not contain the stipulated number of pieces, and on a complaint being made to the plaintiffs they sued the defendants for the price of the pieces short-delivered. *Held,* (1) they were liable to pay the price; and (2) the fact that their own vendor had become insolvent did not affect the question of their liability. *Held,* also the period of limitation was that prescribed by Art. 96 of the Limitation Act and not Art. 62, and limitation commenced to run from the date of knowledge of short-delivery. *K. M. P. R. Firm* v. *The Official Assignee of Madras,* 43 M L J 142 distinguished.

On appeal from the judgment of the Hon'ble Sir Walter Salis Schwabe, K. C., *Kt.*, Chief Justice, dated the 25th day of October, 1925, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 174 of 1922.

V. Radhakrishnayya and *A. V. Seshayya* for appellants.

T. D. Srinivasachariar and *T. Chakravarthi Aiyangar* for respondents.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS :—*The Chief Justice* :—In this case the appellants bought some bales of grey shirtings from one Krishnaji Kesari Mull, a Bombay merchant. They sold them to the plaintiffs and then they went through a long chain of changing hands and, in the end, some 7 or 8 months after the bales had been sold, it turned out that some of them were short by 10 pieces; that is to say, whereas they purported to contain 60 pieces they in fact contained only 50.

The learned Chief Justice, my predecessor, who tried this case found on the evidence before him that, although only 3 bales had been opened, the reasonable conclusion of fact was that the shortage extended to the other 5 bales which were exactly of the same size, appearance and description and, with that finding which the learned Judge was entitled to come to, we do not desire to interfere. There was evidence to support it and one knows that to rip up a bale for the purpose of counting the contents has a most damaging effect upon its value in the market.

There are only two points really argued and they are both points of law. It appears that the defendants were unable when the mistake was found out to have recourse to their sellers because the sellers had gone bankrupt. They may not be able to get a dividend. That being so, reliance was placed on a judgment of this Court to which I was a party, *K. M. P. R.*

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Firm v. *Official Assignee of Madras* (1), in which the facts were the converse. There, there had been an over-delivery of 14 pieces, a delivery which was thought to be one of 7,000 pieces, but really turned out to be of 7,014 pieces. We there held that one of the persons in the chain was not accountable to his immediate seller because he, in good faith, had passed all the 7,014 pieces to his immediate buyer, all parties being of the belief that they really were only 7,000. Rightly or wrongly we held there and it may be we expressed the proposition in too general terms that in such cases redress could be had by the plaintiff only if he was able to show that his goods which were not covered by the contract, namely, 14 extra pieces were in the possession of the defendant or that the defendant had had the benefit of them. But in *Standish* v. *Ross* (2) it was held that it was unnecessary to plead any such circumstance. "It is quite true I had your money in my hands but unfortunately you paid them thinking you owed the money. I have gone and spent it on a luxury." That was held in *Standish* v. *Ross* (2) not to be an answer to the claim. But it seems to us that that case has no application whatever to a case like the present where the converse is the fact, where the seller has failed to deliver to the buyer that which he contracted to deliver ; and it is unaffected by the fact that the unfortunate buyer has been held liable to a third person and the still more lamentable fact that the unfortunate seller has got a remedy back only against an insolvent person— risk to which every commercial man is liable.

Then a point is raised about limitation. It is said that this case falls within Art. 62 of the Limitation Act because it is a case of money had and received to the use of the plaintiff. No doubt, if one were drawing a pleading in an English Court in the approved Bullen and Leake style, after setting out the facts which, after all, is the real function of a pleading, one would end up by saying "the money claimed is money had and received to the use of the plaintiff." But it does not follow that the article is exhaustive, because a later article, Art. 86, provides for a special case of money had and received to the plaintiff's use. It runs as follows:—

"For relief on the ground of mistake	3 years	When the mistake becomes known to the plaintiff."

1. (1922) 43 M L J 142   2. (1849) 3 Ex. R. 527.

It specifies that the time when limitation begins to run in such a case is when the mistake becomes known to the plaintiff. It seems to me that that special article must override the general provisions of Art. 62 and that it fixes a time when the plaintiff's cause of action depends upon the fact that he was mistaken as different from the time when the mistake was ascertained ; or, I suppose, in certain cases it may be that you would have to qualify that by saying " the time when the plaintiff ought to have discovered his mistake if he used reasonable diligence." However, we are not concerned with that here ; because, having regard to the known habits and customs of the piecegoods market here, I do not think any Judge would venture to say that nine months was too long a time for the goods to be passing from hand to hand in their wholesale state as bales. It is a well-settled principle on which the English Courts have acted for centuries that, in all cases where something turns upon a mistake or concealment of fact by the fraud or deceit of the other side, the time from which limitation must be taken to run is always the time when it was brought to the plaintiff's knowledge that there had been a mistake or a fraud. We therefore think that the learned Trial Judge was right on all the points in this case and that the appeal must be dismissed with costs ; but there will be this modification of the decree—and Mr. K. S. Krishnaswami Iyengar has very wisely accepted it because, after all, it is apparently rather a hard case—that is, the time from which interest is to be taken to run is not the initial short delivery but the time when the demand was made upon the defendants by the plaintiffs, *i. e.,* the 24th April, 1919. The decree will be modified to that extent, otherwise the appeal will stand dismissed with costs.

Krishnan, J.

Krishnan, J.—I agree with the learned Chief Justice that this appeal fails. The first point taken on the facts of the case is that it has not been proved that all the 8 bales, in each of which a shortage of 10 pieces is claimed by the plaintiff, contained only 50 pieces each and not 60. It is said that it is only as regards 3 bales the shortage has been properly proved as they were opened and the pieces actually counted ; but as regards the other bales there is no doubt whatever that the late learned Chief Justice is right in the view he took that they should be taken as shown to have contained only 50 pieces each. One of the bales opened for the purpose of finding out whether the 6 bales left in the hands of Motilal contained only 50 pieces each or 60, was taken at random as a

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sample bale from the lot and it was found to contain only 50 pieces. That evidence is quite sufficient to justify the findings as regards all the 8 bales. The fact of the shortage is thus established.

The next question is one of law based on the ruling of the learned Chief Justice, then Mr. Justice Coutts Trotter and Mr. Justice Ramesam in *K. M. P. R. Firm* v. *Official Assignee of Madras* (1). That case has now been explained by the Chief Justice ; it does not really apply to the facts of the present case and it is therefore unnecessary to consider how that case overstated the law. I should, however, not be taken as agreeing to the statement of the law in that case ; for I am inclined to think there is a little overstatement in it.

Reference has been made to *Baylis* v. *Bishop of London* (2) and *Newall* v. *Tomtesson* (3). It is, however, unnecessary to pursue this matter further as the facts of this case are quite different from the facts of those cases. It is said that, because the seller from whom the defendant purchased the goods became insolvent, the defendant has lost his chance of getting his money from the seller and therefore he should not be called upon to pay for shortage to his buyer. There is no authority cited to show that this doctrine is correct. It was the misfortune of the defendants that their seller has become insolvent. Whether he became an insolvent after the defendants got notice that a claim was going to be made against them by the plaintiffs or not is not very clear. For, if the insolvency happened only afterwards, it will be clearly defendants' own fault if they did not take steps in time to recover what they would have been entitled to claim from their seller. However that may be, we are not concerned with the question. It is clear that the defendants are bound to return the price which they received for the 10 pieces each of the 8 bales in which there was a shortage.

The last question argued is one of limitation and it is one of some difficulty. It is contended that Art. 62 applies to the case. I do not see how that article can be applied, for it refers to money had and received by the defendant for the plaintiff's use. It does not refer to a case like this where money had been paid under a mistake of fact and is now sought to be recovered on the ground that it was so paid. Both the

1. (1922) 43 M L J 142. 2. L R (1913) 1 Ch 127. 3. L R 6 C P 405.

parties believed that the bales contained 60 pieces each and the price was paid and received on that footing; it was subsequently found out that there was a mistake, there being only 50 pieces in each of the 8 bales. The excess price paid is clearly money paid by mistake and Art. 96 applies as the late learned Chief Justice has held. I agree therefore that the bar by limitation does not arise on the facts of this case. The appeal will be dismissed with the modification of the decree proposed as regards interest.

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Krishnan, J.

The Chief Justice again :—I should just like to add that, at the time I and my brother Ramesam decided the case *K. M. P. R. Firm* v. *Official Assignee of Madras* (1) *Baylis* v. *Bishop of London* (2) was not cited to us and I should like to consider that case further before expressing any final opinion as to the correctness of our decision in *K. M. P. R. Firm* v. *Official Assignee of Madras* (1).

T. S. V. *Appeal dismissed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD SUMNER, LORD BLANESBURGH, SIR JOHN EDGE, MR. AMEER ALI AND LORD SALVESEN.

Nowroji Rustomji Wadia ... *Appellant**

v.

The Government of Bombay ... *Respondent.*

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Nowroji Rustomji Wadia v. The Government of Bombay.

Land Acquisition Act (I of 1894)—Compensation—Undeveloped land—Value—Practice of Privy Council in such appeals.

The Privy Council will entertain appeals in compensation cases under the Land Acquisition Act (I of 1894) only on questions of principle, where there has been error in law or miscarriage of justice, and not upon questions of value, which latter are, in matters both of fact and law, the proper subject of appeal to the Courts in India, possessing specific local knowledge and experience ; and the Privy Council will not review the decree of an Indian Appellate Court merely upon questions of value.

Secretary of State v. *General Steam Navigation Co.*, I L R 36 Cal 967 ; *Rangoon Botatoung Co.* v. *Collector, Rangoon*, 39 I A 201 (40 Cal. 21) ; *Charandas* v. *Ameerkhan*, 47 I A 264 ; *Narsingh Das* v. *Secretary of State*, 52 I A 133 ; *N. Luchmedevamma* v. *V. Naidoo*, 9 Moo I A 87 ; and *Umrao Begum's case*, 21 I A 163 referred to.

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*P C Appeal No. 43 of 1924. 12th June, 1925.

1. (1922) 43 M L J 142. 2. L R (1913) 1 Ch 127.

P. C.

Nowroji Rustomji Wadia v. The Government of Bombay.

Appeal from a decree of the High Court (Macleod, C. J. and Shah, J.) dated 20th September, 1921, modifying a decree of the same Court (Kajiji, J.), dated 30th August, 1920, on a reference thereto under the Land Acquisition Act (I of 1894).

On the 22nd December, 1912, the appellant agreed to buy for Rs. 50,204 certain vacant undeveloped land near the junction of de Lisle and Arthur Roads, Chinchpokli, Bombay, of the area of 22,313 sq. yds.; and on the 10th February, 1915, he paid for and obtained a conveyance of the same. In 1917, the respondent, through the Collector, acquired the land for the Bombay Municipal Corporation for the extension of the Hospital for Infectious Diseases, and awarded Rs. 98,724 as compensation, *i. e.*, at Rs. 8 per sq. yd. less a small discount to allow time for disposal of the plots. Upon a reference to the High Court under S. 18 of the Land Acquisition Act (1 of 1894), Kajiji, J. awarded Rs. 10 per sq. yd., *i. e.*, Rs. 1,39,970 on the 30th August, 1920. The Court of Appeal (Macleod, C.J. and Shah, J.) on the 20th September, 1921 reversed the decree of Kajiji, J. and restored the award of the Collector. The appellant appealed to His Majesty in Council.

Sir G. Lowndes, K. C. and *E. B. Raikes* for appellant.

A. M. Dunne, K. C. and *A. M. Talbot* for respondent.

12th June, 1925. The Judgment of the Board was delivered by

Lord Sumner.

LORD SUMNER.—In 1917 the Municipality of Bombay acquired a plot of land for purposes connected with an existing hospital, and the usual statutory proceedings took place before the Collector of Bombay to fix the amount of compensation to be paid for the land. The owner, being dissatisfied with the amount awarded, viz., Rs. 98,724, claimed a reference to the High Court, and in 1920 Kajiji, J., varied the Collector's award by increasing the rate to be allowed per square yard superficial from Rs. 8 to Rs. 10. This raised the total compensation to Rs. 1,39,970. Upon an appeal by the Municipality the High Court set aside the learned Judge's decree and dismissed the reference. They thus in effect confirmed the Collector's award. From this decision the claimant now appeals.

The value to be placed at a given moment on a plot of land, which is not in the market or the subject of bargain and sale, but owes a large part of any value it possesses to the

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prospective results of development work, to be undertaken thereafter at an uncertain time and at an estimated cost, is not only in its essence a question of fact but is one upon which, almost above any other, opinions will differ, without its being possible to give irrefragable reasons for any particular conclusion.

It has been declared in decisions of the Board, by which their Lordships are now bound, that appeals in valuation cases will only be entertained on questions of principle. (See *Secretary of State v. General Steam Navigation Co.* (1); *Rangoon case* (2) per Lord Macnaghten; *Charandas v. Ameer Khan* (3) per Lord Buckmaster—"this Board will not interfere with any question of valuation"—and *Rai Bahadur Lala Narsingh Das v. Secretary of State for India* (4). Errors in law, including errors in appreciating or applying the rules of evidence or the judicial methods of weighing evidence, are matters that can and will be dealt with on appeal by this Board, but when, as in the present case, a difference of opinion has occurred between two Indian Courts upon the number of rupees per yard to be allowed for a plot of land, as to which their Lordships can form no opinion of their own, it would be alike unprofitable and impracticable to embark on a comparison of the decisions of these Courts. In cases relating to the acquisition of land the whole matter, both of fact and law, is a proper subject of appeal in India, for there local knowledge and experience enable the learned Judges to form useful judgments upon the whole case. The amending Act of 1921 declares awards under the Land Acquisition Act, 1894, to be decrees, so as to bring them within the general rules as to appeals to this Board, but it does not prescribe any special mode, in which they are to be treated. This Board has found it necessary to limit the extent of the inquiry, in order to spare the parties costly and fruitless litigation. Just as in cases where there are concurrent findings of fact in the Indian Courts, it has long been the general rule of the Board not to allow such findings to be reopened here [*Naragunty Luchmedavamah's case* (5); *Umroo Begum's case* (6)], so it has now been settled that this Board will not review the decree of an Indian Appellate Court merely

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1. (1909) I L R 36 C 967 : 19 M L J 645 (P C).
2. (1912) I L R 40 C 21 : 27 M L J 276 (P C).
3. (1920) L R 47 I A 255 at 264: 39 M L J 195.
4. (1925) L R 52 I A 133 : 48 M L J 386.
5. 9 M I A 87.
6. (1894) L R 21 I A 163.

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upon questions of value. Where their Lordships have neither the materials nor the experience on which to found an opinion of their own, in a matter where the opinions of competent Courts in India differ (and *a fortiori* where they concur), it is not their practice to interfere, as an appellate tribunal, unless there appears to be error in law or miscarriage of justice.

In view of this practice the present case may be shortly dealt with. The plot to be acquired was irregular in shape and contour. Except at one point, and there only by a narrow passage, it had no access to any road. Part of it was hollow and low-lying, so that in the rains water accumulated there to the depth of several feet. No transactions were proved in respect of land closely adjacent to or precisely similar to this plot and such transactions as had occurred were cases of development and sale at dates not at or about the material time, *viz.*, 1917. The question, whether or not there had afterwards been an upward trend in market values generally, was not only highly disputable as a matter of opinion, but was not affirmatively supported by any satisfactory proof.

Both parties admitted that the most satisfactory use, to which the land could be put, was the erection of workmen's dwellings, and the value of the land for this purpose accordingly became the question to which both directed their attention. Development of this kind required the dedication of a considerable part of the surface, in order to provide an access road, and also the raising of the whole surface to one level, free from risk of flooding, by permanently filling in the cavities with suitable loose material. Estimates of the area of land required for the road and of the cost of filling in per cubic yard were accordingly prepared, and were agreed on both sides. It does not appear, however, that any allowance was made for the time required to enable the made ground to settle, or for the risk that unexpected settlements might take place, and probably these factors were beyond any exact estimation. Of course the circumstances that might exist, when the work was done and the realisable value of the developed site could be ascertained, were alike beyond human foresight.

Kajiji, J., appears to have addressed himself to the question of the fair compensation for land taken in 1917, to be allowed as at that date, as if it were an algebraic problem, which could be solved by an abstract formula. He sought to ascertain what value per yard the land might be supposed to have, if improved at some uncertain date, by treating the cost

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of filling in the cavities as a determined sum, to which there could not be any addition, and by deducting this sum alone from the supposed realisable value after future development. From these somewhat abstract factors he arrived at a concrete rate per superficial yard to be paid presently by way of compensation. In doing so he took no account of the factor of interest on the cost of the filling in and the other development work during the uncertain interval before the time of realisation might arrive.

From his conclusions thus arrived at the High Court dissented. Their reasons are not very clearly given, but this may be due to the fact that the evidence, which they discussed, is not very clearly recorded. At any rate, as it appears to their Lordships they fell into no error of principle in their criticisms of the judgment of Kajiji, J., or in the process by which they arrived at their own conclusions. In dissenting from the method, which the learned Judge seems to have followed, they were certainly right. Factors such as he omitted to notice may be of great importance or of little, or even may be truly negligible, according to the circumstances of the particular case, but it cannot be right to ignore them altogether, as having no place at all in a rigid system of calculation. They were guided by their own view, as they were entitled to be, of the weight of the various pieces of evidence, nearly all of indirect bearing on the problem in hand—and in many cases only imperfectly developed. They thought, as they were entitled to think, that the grounds, on which the supposed rise in general market values was rested, were so unsubstantial in themselves and so distantly related to the circumstances of the site in question, as not to amount to any evidence on which to rest the judicial conclusion that something should be allowed for a rising market.

After carefully examining the evidence and the way in which the High Court appears to have dealt with it in arriving at the conclusion now under appeal, their Lordships are unable to find that there has been any error in principle or in law in the method of arriving at it. They will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant : *T. L. Wilson and Co.*

Solicitor for respondent : *Solicitor, India Office.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Allahabad)

PRESENT :—LORD SHAW, LORD CARSON, SIR JOHN EDGE, AND MR. AMEER ALI.

P. C.

Gajadhar Mahton v. Ambika Prasad Tewari.

Gajadhar Mahton ... *Appellant**

v.

Ambika Prasad Tewari and others ... *Respondents.*

Hindu Law—Joint family—Mortgage of family property by managing member thereof—Suit for mortgage decree—Civil Procedure Code, 1908, O. 34—Onus of proving legal necessity for mortgage—Mortgagee's claim at hearing of appeal for decree on mortgagor's personal covenant—Discretion as to amendment of plaint—Respondents not present at hearing of appeal—Costs.

Where, in an action founded on a mortgage made of the property of a joint Hindu family by the managing member thereof, the mortgagee claims a decree for the sale of the property, the onus rests upon him of establishing that the mortgage was legally necessary and for the benefit of the family. *Hunoomanpersaud Panday* v. *Baboose Munraj Koonweree*, 6 Moore's I. A. 393 referred to.

The Board will not entertain, in such an action, a claim for a simple money decree against the managing member upon his personal covenant, where no such claim was raised in the original plaint, or advanced before the Courts in India, nor pleaded in the printed case and Grounds of Appeal lodged by the appellant before their Lordships, nor will leave to amend the plaint be granted in such case.

Where the respondent lodges his printed case, but does not appear at the hearing of the appeal, which is eventually dismissed, he is entitled to costs up to the lodging of his case.

Appeal from a decree of the High Court (15th February, 1922) which reversed a decree of the Subordinate Judge, Basti (9th April, 1919), and dismissed the appellant's suit with costs.

The facts appear sufficiently from the judgment of their Lordships.

L. de Gruyther, K. C. and *J. M. Parikh* for appellant.

The respondents were not represented.

13th March, 1925. The Judgment of the Board was delivered by

Mr. Ameer Ali.

MR. AMEER ALI :—This is an appeal from a judgment and decree of the High Court of Allahabad dismissing a suit brought by the appellant for the enforcement of a mortgage executed in his favour by one Jai Gobind Tewari on the 28th of August, 1907. Jai Gobind Tewari was a member of a

* P C Appeal No. 17 of 1924. 13th March, 1925.

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joint Hindu family subject to the Mitakshara and apparently managed the family business.

The suit was brought before the Subordinate Judge of Basti against all the members of the joint family; and some transferees of part of the property were joined as defendants.

The plaintiff who is a moneylender alleges that Jai Gobind Tewari had borrowed from him two sums of money which in the aggregate amounted to Rs. 2,715 on two bonds, for legal family necessity, and for this amount he passed the mortgage bond in suit.

The defendants 3 to 6, who alone contested the suit, urged it was not for legal necessity or family benefit as the plaintiff alleged.

The Subordinate Judge decreed the plaintiff's claim for sale of the mortgaged property under R. 4, O. 34 of the Civil Procedure Code.

The High Court on appeal came to the conclusion that the onus was on the plaintiff to establish legal necessity in order to bind the joint family by the acts of Jai Gobind and that he had failed to prove such necessity. They accordingly dismissed the claim. The plaintiff has appealed to His Majesty in Council from this order of dismissal.

Their Lordships have heard learned Counsel for the appellant at considerable length and they find themselves in agreement with the High Court in holding that no legal necessity is established. The principle applicable to a case where it is sought to bind the joint family by the acts of the managing member has been clearly enunciated by Lord Justice Knight Bruce in the case of *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree* (1).

Their Lordships think that the decree of the High Court is right and that the appeal should be dismissed.

But it has been contended that even if the joint family is not bound by the mortgage created by Jai Gobind Tewari, he is liable on the personal covenant for the debt contracted by him. No such case was made in the plaint or urged before the High Court, nor is any such case made in the grounds of appeal before their Lordships or in the case as originally lodged by the appellant. The claim was for a mortgage decree. According to Counsel's statement it was only when the appeal

1. (1854) 6 M I A 393.

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came into his hands that the idea of a decree on the personal covenant occurred to the plaintiff's advisers. Their Lordships are of opinion that having regard to the circumstances of the case the claim for a simple money decree against Jai Gobind urged before the Board cannot be entertained. No such decree could be made without an amendment of the plaint; and although it is in their Lordships' discretion to allow an amendment even at the last stage, they do not think that this is a case in which that discretion should be exercised.

As regards the respondents' costs they appear to have lodged a case but did not appear at the hearing. They are clearly entitled to their costs up to that stage. The rule in such circumstances is stated in Mr. Norman Bentwick's "Practice of the Privy Council in Judicial Matters" on page 337 as follows :—

"When respondents lodged a case, but did not appear at the hearing, the appeal was dismissed with costs to be paid to respondents down to the lodging of the cases, and ordered to be paid out of the deposit placed in the registry as security."

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs to the respondents up to the lodging of the case.

Solicitors for appellant : *Pyke, Franklin and Gould.*

Solicitor for respondents : *H. S. L. Polak.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Patna.)

PRESENT :—LORD ATKINSON, LORD SHAW AND LORD DARLING.

Musammat Hira Bibi and others ... *Appellants**

v.

Ram Hari Lal and others ... *Respondents.*

P. C.

Musammat Hira Bibi v. Ram Hari Lal.

Transfer of Property Act (IV of 1882), S. 59—Mortgage by purdanashin lady—Attestation—Evidence Act (1 of 1872), S. 70.

A mortgage purporting to be executed by a purdanashin lady, and bearing on it, by way of attestation, the signatures of persons who were not present at her execution thereof, is not attested in the manner required by S. 59 of the Transfer of Property Act (IV of 1882), and is therefore void as against her.

*P C Appeal No. 6 of 1924. 23rd June, 1925.

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Shamu Pattar v. Abdul Kadir Ravuthan and others, 39 I A 218 ; *Bryan v. White,* 2 Rob. Ecc. 315 ; and *Ganga Pershad Singh v. Ishri Pershad Singh,* 45 I A 94 referred to.

Padarath v. Ram Nain Upadhia, 42 I A 163 distinguished.

A document is not duly and legally attested within the meaning of S. 70 of the Evidence Act (I of 1872) if it is merely signed by persons who, though professedly witnesses to its execution, were in truth and in fact, not so.

Appeal from a decree (10th June, 1921) of the High Court (Das and Adami, JJ.) which partly affirmed and partly reversed a decree (26th September, 1917) of the District Judge of Patna (R. L. Ross, Esq.).

The facts of the case sufficiently appear from the judgment of their Lordships.

L. de Gruyther, K. C. and *W. Wallach* for appellants.

Sir G. Lowndes, K. C. and *E. B. Raikes* for respondents.

23rd June, 1925. The Judgment of the Board was delivered by

Lord Darling.

LORD DARLING :—This is an appeal from a judgment and decree, dated 10th June, 1921, of the High Court of Judicature at Patna, partly affirming and partly reversing a judgment and decree of the District Judge of Patna. The suit was brought to enforce a mortgage dated 17th August, 1906. It was pleaded by the defendants (appellants) that the mortgage bond is void by reason of its not being attested in accordance with the provisions of the Transfer of Property Act (IV of 1882), S. 59.

The only important question upon this appeal is in regard to the appellant Musammat Hira Bibi and her liability on the mortgage bond. It is admitted that she actually signed the bond, but it is a document which requires attestation by witnesses, as is provided by statute.

Hira Bibi is a purdanashin lady. The evidence shows, beyond contest, that when Hira Bibi signed the mortgage bond not one of the persons who signed as witnesses was present or saw her sign it. She was behind the purdah. Anant Prasad, her son, took this deed, and others, inside the purdah. He came out and told those outside, and out of sight of Hira Bibi, that she had signed the deed, and after this all those signed whose names appear as witnesses.

The learned Judges from whose judgments this appeal is brought have themselves declared that this is wholly insufficient to comply with the statute relating to the due execution and attestation of such a document as this mortgage bond, but

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they have held that the deed is good as against Hira Bibi, because she has admitted that she signed it.

Mr. Justice Das—with whose judgment Mr. Justice Adami agreed—put the case thus :—

"If the matter were *res integra* I should doubt whether the admission of a party can render valid that which is invalid. The question is—Is the rule enunciated in S. 59 of the Transfer of Property Act a rule of law affecting the validity of the mortgage or is it a rule of evidence affecting the proof of the document? If it be a rule of evidence the question becomes one of proof and the admission of a party would be in the circumstances quite sufficient. But if it be a rule of law then it is difficult to understand how the admission of a party helps the solution of the problem. My own view is that S. 70 of the Evidence Act operates only where the mortgagee has not given any evidence at all of due execution of the document by the mortgagor, but relies on the admission by the mortgagor. If, for instance, the mortgagor admits the execution of the document in the written statement it is wholly unnecessary for the mortgagee to adduce any evidence as to the execution of the document. But the matter would stand on an entirely different footing if the mortgagee produces his evidence of execution and that evidence establishes that the document was not attested in the manner required by S. 59 of the Transfer of Property Act. I am, however, bound by the decisions of the Calcutta High Court and of this Court. In accordance with those decisions I must hold that the admission of the defendant renders it unnecessary for the plaintiffs to prove that the document was executed and attested in the manner required by S. 59 of the Transfer of Property Act."

It appears, then, that the Judges of the High Court of Patna would have held that this mortgage bond was not duly executed by the appellant, Hira Bibi, had they not felt bound to follow earlier decisions of that Court and of the High Court of Calcutta. They appear to have been unaware of several cases decided on appeal by this Board, and directly dealing with the matter in question. When these are considered it appears to their Lordships that this case is already concluded by authority. It is needless to do more than to call attention to them very briefly :—

Shamu Patter v. *Abdul Kadir Ravuthan and others* (1) decides that to be a good signature attested by two witnesses, within the Transfer of Property Act, 1882, S. 59, the persons signing as witnesses must be present at the execution of the instrument. Their Lordships adopted these words of Dr. Lushington [in *Bryan* v. *White* (2)] : "'Attest' means the persons shall be present and see what passes, and shall, when required, bear witness to the facts." And they follow-

1. L R (1912) 39 I A 218 : 23 M L J 321. 2. (1850) 2 Rob. Ecc. 315-317.

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the Government revenue, to return the said villages to the plaintiff or his male issue, as the case may be. The plaintiff or his male issue shall, during the lifetime of the defendant be not permanently dispossessed of the said villages, and in the lifetime of the defendant 'khewat' of superior right in respect of these villages will be prepared in favour of the defendant, and subordinate 'khewat' in favour of the plaintiff with power of transfer."

There were further terms providing that the villages in question should, after the life of the appellant and his brother, be reserved for the maintenance of the latter's descendants and widow.

The Subordinate Judge (A. Hasan, Esq.,) on the 10th August, 1920, dismissed the application because he considered that the appellant interest was a right to future maintenance, and that the case was governed by *Ghulab Kuar* v. *Bansidhar* (1). On appeal, this decree was reversed by the High Court (Walsh and Wallach, JJ.), who remarked :—

"Property such as this........is clearly saleable. Once the villages are known, the standing charges ascertained, and a rough estimate formed of the net profits, it only requires a calculation of the value of the life of Lal Bahadur Singh to arrive at some sort of capital sum to represent the interest of Rajendra Narain Singh during his brother's lifetime of these annual payments. We are unable to take the view that an arrangement of this kind is in any way contemplated by or covered by the expression 'a right to future maintenance.' The expression contemplates a bare right of maintenance and nothing more, a right enforceable by law and payable in the future. It is obvious from the terms of the compromise with which we have to deal that the income of Rs. 8,000 contemplated and provided for something very much more than bare maintenance, although as an income it may well be regarded as a mere pittance for a gentleman in the position of the debtor."

The judgment-debtor thereupon appealed to His Majesty in Council.

L. de Gruyther, K. C. and *E. B. Raikes* for appellant.

K. V. L. Narasimham for respondent.

19th February, 1925. The Judgment of the Board was delivered by

Lord Shaw.

LORD SHAW :—The Board is of opinion that the conclusion reached by the High Court by their judgment of 2nd May, 1921, was correct. It is to be regretted that the High Court did not itself, in the exercise of its powers, appoint a receiver of this property which the judgment-creditor seeks to attach and bring to sale.

Their Lordships do not agree with the High Court on the subject of the actual legal position of the right of maintenance conferred upon the judgment-debtor. That right of main-

1. (1893) I L R 15 A 371.

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tenance arose under a compromise which was made between the judgment-debtor and his brother. The compromise agreement is not produced, but its terms are said by the parties to be recorded in a decree pronounced by the Subordinate Judge of Jaunpur on 20th May, 1915. The substance of this agreement is that the judgment-debtor one of the two brothers parties to the compromise, was declared to have a right of maintenance in certain villages enumerated, the right being conferred expressly "without power of transfer."

In the present case the Subordinate Judge in his judgment of 10th August, 1920, correctly limits the issue between the parties to this maintenance question. No other point was brought before the Board. Speaking of the plaintiff, the Judge says :—" He now wants to execute that decree against the property in 16 villages, which the judgment-debtor has got from his younger brother, Raja Lal Bahadur Singh, for his maintenance. His prayer is that this right of maintenance be proceeded against and a Receiver appointed to realise rents and profits of the abovenamed 16 villages and the decretal amount be paid out of the said realisation as far as possible. To this the judgment-debtor objects on the ground that the right of maintenance is not attachable under S. 60 of the Civil Procedure Code."

Their Lordships are of opinion that the right of maintenance is in point of law not attachable and not saleable. They think that S. 60 of the Civil Procedure Code, Head N, precludes an application for that purpose.

The proper remedy lies, in a fitting case, in the appointment of a Receiver for realising the rents and profits of the property paying out of the same a sufficient and adequate sum for the maintenance of the judgment-debtor and his family, and applying the balance, if any, to the liquidation of the judgment-creditor's debt. The High Court point out in their judgment " the appropriate remedy is what is known as equitable execution or indirect execution, namely, by the appointment of a Receiver who takes the place of the debtor and acts as an officer subject to the directions of the Execution Court in collecting and disbursing the debtor's income in accordance with the directions of the Execution Court towards the discharge of the claim of the decree-holder. " These views appear to the Board to be sound.

Their Lordships think that the judgment of the High Court should be modified in the sense described, and that the

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case should be remitted to the High Court to make the appointment of the Receiver on the terms just quoted.

In the circumstances their Lordships think that there should be no costs of this appeal ; and they will humbly advise His Majesty accordingly.

Solicitors for appellant : *T. L. Wilson and Co.*

Solicitor for respondent : *H. S. L. Polak.*

A. de M. *Decree modified.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD SUMNER, SIR JOHN EDGE AND LORD SALVESEN.

Kondapalli Vijayaratnam and another ... *Appellants**

v.

Mandapaka Sudarsana Rao and others ... *Respondents.*

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Vijayaratnam v. Sudarsana Rao.

Minor—Joint will and authority to adopt—Registration—Requirements for validity thereof—Majority Act (IX of 1875), Ss. 2 and 3—Succession Act (X of 1865), S. 46—General Clauses Act (X of 1897), S. 3—Registration Act (III of 1877), Ss. 17, 23, 40 and 41.

A document purporting to be a will and an authority to adopt a son was executed by a youth aged 19 years who was under the legal guardianship of his mother. He died immediately after executing the document on the 1st October, 1906, leaving him surviving his widow (the grantee of the aforesaid authority to adopt), his mother abovementioned, and two daughters. On the 2nd November, 1906, the father of the boy with reference to whom the widow subsequently went through a form of ceremony of adoption, presented, without the knowledge of the testator's widow or mother, the document for registration, and it was eventually so registered as a will on the 20th December, 1906. On the 24th December, 1913, the widow went through a ceremony of adopting as a son the son of the person who had presented the document for registration in November, 1906, and the deed of adoption that she executed on that date recited that the adoption was in exercise of the power in that behalf contained in the testator's will of the 1st October, 1906.

Held, (1) the will, being that of a minor under guardianship, it was, under the Majority Act (IX of 1875), Ss. 2 and 3, the Succession Act (X of 1865), S. 46, and the General Clauses Act (X of 1897), S. 3, void and of no effect as to the testator's estate ; (2) under the Registration Act, 1877, that part of the document that contained the authority to adopt not being registered within four months by or at the instance of the grantee thereof, was also void, as also was the deed of adoption of the 24th December, 1913, and the act of adoption which it purported to carry out in pursuance of the will of the 1st October, 1906.

Jagannatha Bheema Deo v. *Kunja Behari Deo,* L R 48 I A 482 referred to.

Appeal from a decree (16th April, 1920) of the High Court (Sir J. Wallis, C. J. and Moore, J.), affirming a decree

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*P C Appeal No. 62 of 1923. 11th June, 1925.

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(30th December, 1918) of the District Judge of Ganjam (B. C. Smith, Esq.).

On the 1st October, 1906, Mandapaka Appanna, aged 19 years, and being under the legal guardianship of his mother, executed a will, which *inter alia* stated as follows :—

"I have only two daughters. My wife, Sekaramma, must adopt a boy when she likes."

He died later on the same day, and the document was presented for registration on the 2nd November, 1906, without the knowledge or consent of the testator's mother or wife by Lakshmi Narasayya, uncle of Sudarsana Rao, the first respondent, and the Sub-Registrar accordingly registered it on the 20th December, 1906.

On the 24th December, 1913, the appellants' mother, Sekaramma aforesaid, went through a ceremony of adopting the said Sudarsana Rao, and in the deed of adoption that she executed simultaneously she recited that she had been authorised to make the adoption under her husband's aforesaid will, dated the 1st October, 1906. This deed was registered on the 15th February, 1914.

On the 22nd March, 1916, the appellants, being the two daughters of the abovenamed testator, by their next friend, instituted the present suit against Sudarsana Rao, Sekaramma, and the parents of the said Sudarsana, asserting that their mother, Sekaramma, was entitled to possess their father's estate for life, and that they were her heiress after her death, and claiming declarations that, (1) the aforesaid will be declared void and illegal, and did not confer on their mother any authority to adopt ; (2) the alleged adoption of Sudarsana was illegal and invalid in law ; (3) the alienations so far made by the mother were not valid beyond her lifetime ; and (4) the title to the deceased's lands belonged to the mother during her lifetime.

The District Judge of Ganjam (B. C. Smith, Esq.) who tried the suit, on the 13th December, 1918, dismissed it, and the High Court (Sir J. Wallis, C. J. and Moore, J.), upon appeal on the 16th April, 1920, upheld his decision. The appellants thereupon appealed to His Majesty in Council.

The arguments appear sufficiently from the judgment of their Lordships.

S. Hyam and *B. N. Srivastava* for appellants.

W. Ingram for respondents.

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Vijaya-ratnam v. Sudarsana Rao.

Lord Salvesen.

11th June, 1925. The Judgment of the Board was delivered by

LORD SALVESEN :—The circumstances out of which this suit has arisen, so far as they are material to the judgment, may be very shortly stated.

One Mandapaka Appanna, a Sudra in the Ganjam district, who was possessed of a considerable amount of property, died in 1906 leaving a widow and two daughters, the latter being the plaintiffs in the action. When on his death-bed and within an hour or two of his actual death he executed a document, which purported to be a disposition of his property and at the same time conferred a power of adoption on his widow. This document was registered as a will at the instance of a legatee. It was challenged by the plaintiffs (who are still in minority) on the ground among others, (1) that it was not genuine, and (2) assuming that the signature which it bore to be that of the deceased, that he was incapable at the time of understanding its contents owing to the illness from which he shortly afterwards died.

Both Courts have decided, although with much hesitation, that the will was genuine and on the question whether the deceased was in a fit condition to dispose of his property, the Subordinate Judge held that he was, and the High Court of Judicature at Madras may be presumed to have endorsed his judgment, although they have not expressly dealt with this matter in their reasons. Whether it is competent in these circumstances for their Lordships' Board to entertain an appeal from what may be represented as concurrent judgments on questions of fact it is unnecessary to consider, for a point of law remains, the decision of which in their Lordships' view is sufficient for the disposal of the appeal.

At the time of his death Mandapaka Appanna was admittedly only 19 years of age and was under guardianship. Act No. IX of 1875 provides, S. 2, that nothing therein contained should affect the capacity of any person to act in the following matters, namely :—Marriage, Dower, Divorce, Adoption.

Section 3 provides as follows :—

"Subject as aforesaid, every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Indian Succession Act (X of 1865) or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before ;

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"Subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before."

It follows, therefore, and indeed is matter of admission, that the document which purported to be a will of Mandapaka Appanna could have no legal effect as such. On the other hand, as Mandapaka Appanna was over 18 years of age, an authority to adopt, whether oral or in writing, was within his legal capacity.

A power to adopt may be embodied in a will and if the document now under consideration can be treated as such the judgment under appeal cannot be impugned. "Will" is defined by Act X of 1865 as :—

"The legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death,"

and by S. 3 of Act X of 1897 :—

"Will shall include a codicil and every writing making a voluntary posthumous disposition of property."

The learned Judges in the Court below have held that the document in question satisfied these definitions. If the form of the document only is considered no doubt that would be so, but, having regard to the fact that it was executed by a person who was a minor and incapable of making a will, their Lordships are unable to agree with the decision. The so-called will is not a "legal declaration of the intentions of the testator," for it had no legal effect and was not capable of disposing of any of the estates of the deceased. So far as it purported to deal with his property it was a nullity. That a document is called a will although it does not operate to any effect as such will not give it the effect of a will for any other purposes. This was so held in the case of *Jagannatha Bheema Deo* v. *Kunja Behari Deo* (1), a case which was not before the learned Judges of the High Court as it was not decided till after their judgment had been pronounced.

It does not follow, however, as the learned Subordinate Judge held that "a person who is incapable of making a will is incapable of conferring an authority to adopt by a will though he may be capable of giving an authority to adopt to be exercised after his death." Their Lordships see no reason to doubt that a document which purported to be a will but was inoperative as such might nevertheless constitute a valid author-

1. L R (1921) 48 I A 482 : 41 M L J 648.

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Spencer, Offg. C. J.

Sami Aiyar. Out of the 45 acres given to his wife, the adopted son was to get 26 acres 35 cents upon the widow's death. After the bequest in favour of the plaintiffs had become vested in them upon Ramakrishna Aiyar's death, their father sold the properties bequeathed to them under the will, to the 1st defendant, who, in turn, sold them to the 2nd defendant, who is alleged to be the benamidar of the adopted son, the 3rd defendant. The plaintiffs obtained a decree in the Lower Court for possession of the property sued for with mesne profits and costs. The adopted son (the 3rd defendant) now appeals. The 2nd defendant has also appealed against the order directing payment of costs by him.

The will (Ex. A) was presented for registration on the 25th March, 1910. At the same time a document (Ex. B) was executed by the natural father of the 3rd defendant agreeing to the alienations by will being made by the adoptive father. This document was not registered till the 9th April and the defence to the suit is that it was ante-dated. The Lower Court has decided against the theory of the agreement being ante-dated. The learned Subordinate Judge states that he is certainly of opinion that the will was carefully thought out before the adoption and was executed before the adoption actually took place, that Natesa Aiyar, father of the adopted son, was fully informed of the intentions of the testator and had given his free and voluntary consent to such dispositions and that the consent document was executed and completed before the adoption actually took place. The law on the subject of an adoptive father making a will disposing of his property has been clearly established in *Lakshmi* v. *Subramania* (1). Shephard, J., observes that if an adoption and a disposition of his property by the adoptive father form part of one transaction, the adopted son never acquires any interest in the property disposed of and no question can arise as to his guardian's competency to deal with it. In that case it appeared that the defendant's natural father, when he gave his son in adoption, tacitly submitted to the arrangement contained in a will settling certain property on the testator's wife. This decision has been followed and approved by the Full Bench in *Visalakshi Ammal* v. *Sivaramien* (2), a case of an adoption by a widow in pursuance of her husband's authority, the natural father agreeing prior to the adoption to a disposition of half

1. (1889) I L R 12 M 490.
2. (1904) I L R 27 M 577 : 14 M L J 310 (F B).

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the property for the widow to enjoy during her life. It is clear that from the moment that an adoption takes place, the natural father of the adopted boy loses his authority on behalf of the boy to give his consent to any disposition of property and at the same moment the adopted son becomes a co-parcener in the family of his adoptive father and thereupon the latter has no power to dispose of ancestral property at his own sweet will and pleasure, but can only make alienations for necessary purposes. In *Visalakshi Ammal* v. *Sivaramaien* (2) it is assumed that the natural father would not have agreed to an adoption coupled with a disposition of property unless it was for the benefit of his son, and it is further assumed that the adoptive father would not have taken the son in adoption except on the condition agreed to. In such circumstances, Benson, J. observed the adoption cannot be set aside and the condition with which the adoption was coupled could not be set aside except on strong grounds of legal necessity or public policy. The references in this judgment of Benson, J., to the test of fairness and reasonableness of the dispositions were not really necessary for the disposal of that case. They were based on the remarks in favour of Farren, J. in *Ravji Vinayakrav Jaggannath* v. *Lakshmi Bai* (3) who was considering in the light of Mayne's *Hindu Law* the powers of a guardian to bind his ward by giving his consent to acts done on his behalf during his minority. There is a point of difference between that case and the present, which is that the adoption there was made by a widow in pursuance of an authority from her deceased husband but here the adoption is made by a full owner. The test of reasonableness has been imported into the case dealt with in *Balkrishna Motiram Shri Uttar Narayan Dev* (4) although in that case a document was executed by the natural father of the adopted boy agreeing to a grant in favour of certain charities and the adoptive father was alive at the time of adoption. The learned Judges were of opinion that the authority of *Lakshmi* v. *Subramania* (1) had been weakened by the subsequent decisions in *Jagannadha* v. *Papamma* (5) and *Bhaiya Rabidat Singh* v. *Indar Kunwar* (6) which were cases of adoption by

1. (1889) I L R 12 M 490.
2. (1904) I L R 27 M 577 : 14 M L J 310 (F B).
3. (1887) I L R 11 B 381.
4. (1918) I L R 43 B 542.
5. (1892) I L R 16 M 400 : 3 M L J 193.
6. (1888) I L R 16 C 556 (P C).

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widows whose power of alienation was inferior to that of their deceased husbands. With due respect, I consider that if the father of the boy consented to the adoptive father endowing certain charities and gave his consent at or before the time of adoption to such dispositions, a presumption would arise that the grant was valid.

The 3rd defendant in the present suit having set up the case that the consent was given after the adoption, the onus lay on him to prove that Ex. B was ante-dated. See *Mina Kumari Bibi* v. *Bijoy Singh Dhudhuria* (7). The circumstances that the two documents, the will and the consent agreement, were not registered at the same time is explainable by the fact that the Registrar came to the village to register Ramakrishna Aiyar's will because he was ill. The adoption agreement could not be registered in the village under S. 31 of the Registration Act as it was executed by Natesa Aiyar who was capable of attending at the Registration Office. The Easter holidays intervened from the 24th to 28th March and the document was therefore registered later, but the stamp was bought on the same date as the will was dated as is proved by the stamp-vendor's endorsement. I see no reason to differ from the Lower Court which has found that the execution of the will and the adoption deed were parts of the same transaction and that the documents were more or less simultaneous.

[His Lordship then considered the evidence on the point.]

The 3rd defendant's attempt to split up the transaction into several parts has failed. The Lower Court's finding on the third issue will therefore be confirmed and the appeal dismissed with costs of respondents 1 and 2. The decree, however, will be amended by allowing mesne profits only from 15th January, 1912, according to the prayer in the plaint and not from April, 1911.

The 2nd defendant's appeal in the matter of costs will be dismissed on the ground that his conduct in the Lower Court and previous to the suit was not straightforward. He gave up some of his contentions at the trial. He assisted the 3rd defendant in the conduct of his defence and he got a medical certificate for him and he set up a title in himself which has failed. There is no reason why he should not be made responsible for the plaintiff's costs. Appeal No. 461 of 1922 is therefore dismissed with costs.

7. (1916) I L R 44 C 662 at 671 : 32 M L J 425 (P C).

Krishnamurthi Aiyar v. Krishnamurthi Aiyar.

Kumaraswami Sastri, J.

Kumaraswami Sastri, J.:—The 3rd defendant is the appellant. This appeal arises out of a suit for possession of the immoveable properties specified in the plaint and mesne profits filed by the plaintiffs who claim as legatees under a will, dated the 23rd of March, 1910, executed by the adoptive father of the appellant who died on the 2nd April, 1911. His widow died on the 11th of June, 1911.

The case for the plaintiffs is that, prior to the adoption there was an arrangement between the adoptive father and the natural father of the appellant whereby the adoption was made on condition that the adoptive father was to have the liberty of making the dispositions which he made by his will which, according to the plaintiff's case, was executed before the adoption. It is also alleged by the plaintiffs that before the adoption another document filed as Ex. B1 in the case was executed by Natesa Aiyar, the natural father of the appellant, in favour of Ramakrishna Aiyar, the adoptive father, wherein it is stated that the adoption was subject to the condition that the boy to be adopted should only take such of the properties as were given to him by the will of the testator. The case for the plaintiffs is that the adoption was conditional, that the ante-adoption agreement between the natural father and the adoptive father is valid and binding on the adopted son and that plaintiffs are entitled to the properties claimed. It is alleged by the plaintiffs that their father conveyed the properties, which fell to them under the will to the 1st defendant under Ex. 1, dated the 3rd of January, 1912, that the 1st defendant in turn sold the properties under Ex. 1 (*b*) on the 15th January, 1912, to the 2nd defendant and that these sales are not binding on the plaintiffs.

The case for the appellant is that there was no agreement before the adoption and that the will (Exhibit A) executed by the adoptive father and the agreement (Ex. B1) executed by the natural father in favour of the adoptive father were as a matter of fact executed after the adoption ceremony was over. His case also is that the arrangement, even if made before the adoption, would not bind him.

The Subordinate Judge held that the ante-adoption agreement is true and valid and binding on all the parties and that the sale by the plaintiff's father to the 1st defendant is not binding on the plaintiffs as it was made without necessity and for a grossly inadequate consideration. Although one would

have expected that the 1st and 2nd defendants would support the ante-adoption arrangement, they have not chosen to do so and there can be little doubt that they are siding the 3rd defendant. The suggestion is that the 2nd defendant is only a benamidar for the 3rd defendant.

The only question, therefore, for consideration is whether there was an arrangement as set out in the plaint. It is admitted that the properties left by the testator under his will Ex. A are ancestral properties and that unless the arrangement between the natural father and the adoptive father of the appellant was entered into before the adoption and the arrangement is otherwise binding in law on the appellant the will would not operate on the properties devised. The Subordinate Judge in a careful and exhaustive judgment held that the arrangement was entered into before the adoption was made and that it was beneficial to the appellant and is binding on him. I have no hesitation in agreeing with the Subordinate Judge.

[His Lordship next considered the evidence on the point.]

I agree with the Subordinate Judge in holding that there was an arrangement between the natural father and the adoptive father that the adopted son was to take only the properties that were given to him by the will and that the adoption was made conditional under such an arrangement and would never have been made if the arrangement had not been come to before the adoption.

The next question is whether the agreement is binding on the appellant. According to the will, Ex. A the total extent of the land belonging to the testator is 135 acres. The testator gives 12 acres 38 cents for the performance of charities which he had been already performing for several years. He gives his sister's daughter Subbammal 2 acres 3 cents and to another sister's daughter Savithri 7 acres 30 cents. He gives the sons of another sister's daughter 6 acres 34 cents and to a distant relation 37 cents. He gives the adopted son 43 acres 36 cents to take effect immediately on his death. He gives his wife 45 acres 65 cents to be enjoyed by her till her death and on her death 19 acres 30 cents were to be given to the plaintiffs, her cousin's sons, and 26 acres 35 cents were to revert to the adopted son. He gives the plaintiffs 17 acres 90 cents. The outstandings and other properties which he had he leaves to the adopted son. So, under the will, the adopted son gets 43 acres 36 cents immediately and 26 acres 35 cents

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Kumaraswami Sastri, J.

on the death of the testator's wife. The testator's wife died on the 11th of June, 1911, about two months after the testator. Before the adoption the share of the appellant in his natural father's property would have been insignificant. There can be little doubt that the adoption gave the appellant considerable properties to which but for the adoption he would have absolutely no claim. He was a very distant relation of his adoptive father and it cannot be said that there was any expectation that he would succeed to his properties at any time. That the arrangement entered into between the natural father and the adoptive father as evidenced by Ex. B1 was beneficial to the appellant there can be absolutely no doubt.

As regards the binding nature of ante-adoption agreements it is now settled law that an agreement between natural and adoptive fathers is binding on the adopted son if it is for his benefit.

In *Chitko Raghunath Rajadiksh* v. *Janaki* (8) it was held that an agreement between a widow who inherited her husband's property and the natural father of the boy whom she was going to adopt that she should be entitled to enjoy the property during her lifetime subject to the boy's education and maintenance was binding on the adopted son who would not have been adopted but for the agreement. In dealing with the power of the father to give his son in adoption it was pointed out that it was a fallacy to suppose that for the purpose of giving the son in adoption the powers of the father are only co-extensive with the powers of a guardian, and that if a millionarie gave his son in adoption even though all his property was ancestral, to a family possessing no property, the adoption would be valid although the son may be deprived of all his interest in the ancestral property. The decision was followed in *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmi Bai* (3). In *Basava* v. *Lingangauda* (9) it was held that a gift of property by a Hindu father to his daughters is valid if at the time of the adoption the adopted son's natural father agreed to such a disposition. *Venkappa* v. *Fakir Gowda* (10) was relied on; but this decision does not throw much light on the question as it proceeded more on the facts of that particular case. Sir Lawrence Jenkins, C. J. was of opinion that the agreement in that case was not binding on the adopted son. He accepted the test suggested by Sir Charles

3. (1887) I L R 11 B 381.
8. (1874) 11 Bom H C R 199.
9. (1894) I L R 19 B 428.
10. (1906) 8 Bom L R 546.

Farren in *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmi Bai* (3) and held that on that test the stipulations in the agreement were unreasonable. In *Vyasacharya* v. *Venku Bai* (11) it was held on the facts of that case that the arrangement between the natural father and the widow making the adoption whereby certain properties were to be given to the daughter of the adopting widow was not enforceable against the adopted son. As Sir Basil Scott, C. J. in his judgment states that the reference to the Full Bench was limited with reference to the facts of that case and as the decision in *Ravji Vinayakrav* v. *Lakshmi Bai* (3) was not dissented from this decision does not throw much light on the question in dispute. In *Purushottam* v. *Rakhmabai* (12) it was assumed that a fair and reasonable arrangement will be valid and the finding was that the arrangement in question was not binding.

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In *Balkrishna Motiram* v. *Shri Uttar Narayan Dev* (4) a Hindu possessed of ancestral property while making an adoption executed a document with the consent of the natural father of the adopted boy directing payment of an annual sum for the purpose of lighting lamps in a temple. It was held by Heaton and Hayward, JJ., that the grant in favour of the temple was invalid. I find it difficult to reconcile this decision with the other decisions of the Bombay High Court which I have referred to. With all respect to the learned Judges I am unable to agree with them that before making the adoption the person who is absolutely entitled to the property would have no power to make it making the adopted son's rights subject to the performance of certain charities. In *Bepin Behari Bundopadhya* v. *Brojo Nath Mookhapadhya* (13) it was held following the decision in *Mussumat Bhagbutti Daee* v. *Chowdry Bhola nath Thakoor* (14) that a Hindu had power when giving his wife authority to adopt, to direct that so long as she was alive she should remain in possession of all his property. In *Panchanon* v. *Binoy Krishna* (15) it was held that ante-adoption agreements between the widow making an adoption and the natural father of the adopted son will be valid if they are fair and reasonable and the difference was pointed out between such cases and cases where the widow purported to deal with

3. (1887) I L R 11 B 381.
4. (1918) I L R 43 B 542.
11. (1912) I L R 37 B 251 (F B).
12. (1913) 16 Bom L R 57.
13. (1882) I L R 8 C 357.
14. L R (1875) 2 I A 256.
15. (1916) 27 C L J 274.

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more than her interest as a Hindu widow and which would not bind the reversioners.

In *Harendra Nathavasti* v. *Shibo Sundari Debi Chowdhurani* (16) Chitty and Richardson, JJ., held that a Hindu testator has the power to curtail the rights of his prospective adopted son and that an agreement between the widow making the adoption in pursuance of the will of her husband and the father of the adopted boy that she should remain in possession over property for her life is valid and binding on the adopted son.

In *Shanti Parshad* v. *Dhan Devi* (17) it was held by Scott Smith, J., that an agreement between the adoptive father with the natural father postponing the rights of the adopted son to the widow is valid. In this case as the agreement was between the natural and adoptive fathers the question as to the effect if the party was the widow of the last male holder did not arise.

So far as the authority in Madras go, there is a long current of authority for upholding agreements which are not unreasonable. In *Lakshmi* v. *Subramania* (1) it was held that an adopted son was bound by an arrangement which his natural father had agreed to before the adoption whereby the adoptive father's wife was to be entitled to certain lands for her life. Muthuswami Aiyar, J., called for a finding whether, when the respondent was given in adoption, the person who gave him in adoption was aware of the existence of the settlement (marked as Ex. A in the case) and whether, but for the consent to it, the adoptive father would not have adopted the respondent. The learned Judge referred to with approval the decision in *Vinayak Narayan Jog* v. *Govindarav Chintaman Jog* (18) and observed: "In that case it was held that when the adopted son and the person who gave him in adoption were fully cognizant of the disposition of property made by the testator, and with the knowledge of such disposition the natural father consented to the adoption taking place and when the disposition and the adoption might under the circumstances be regarded as one transaction, the disposition though contained in a will could not be repudiated by the adopted son. The principle underlying the decision is that the disposition was one which it was competent to the testator to make prior to the adoption and that its acceptance being presumably a condition subject to

1. (1889) I L R 12 M 490. 16. (1909) 3 I C 378.
17. (1919) 50 I C 113. 18. (1869) 6 Bom H C R (A C J) 224.

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which the adoption was made, it made no difference that the disposition was testamentary. Shephard, J., observed : " In the present case the adoption was made not by a widow as in the case of *Lakshmana Rau* v. *Lakshmi Ammal*(19) but by the plaintiff's husband, who before adoption took place, was unquestionably at liberty to alienate his property as he pleased subject only to the plaintiff's right of maintenance. If being thus full owner he might before the adoption have disposed of his property in part or in whole in favour of the plaintiff, I fail to see why he should not, when making the adoption, stipulate with the other party to the adoption that a certain part of his property should be set apart for the maintenance of his wife and to that extent taken out of the category of property in which his intended son should have the full right of a coparcener * * *. The adoption and the disposition of his property by the father being part of one transaction, the son never acquired any interest in the property disposed of, and therefore no question can arise as to his guardian's competency to deal with it.

These considerations, if well founded, also dispose of the defendant's contention that, in view of the right of survivorship, Ramayyan's will must as against him be inoperative. The will was only a means by which the supposed contract was carried into effect. It was a term of that contract that certain property should be withdrawn from Ramayyan's estate and applied to a particular purpose which should take effect after his death. To that extent the defendant never acquired coparcenary right in his father's property and consequently there was no right of survivorship. The circumstance that the disposition was made by will makes no difference because the will must not be regarded by itself but as part of the contract, and before the adoption took place it was competent to Ramayyan to bind himself by contract to make the will which he did make. For these reasons I am of opinion that if it can be shown that the adoption was made on an understanding between the parties that the defendant should take his place in the family subject to the arrangement made by his adoptive father in favour of the plaintiff, the plaintiff ought to succeed in this suit." This decision of two eminent Judges of this Court shows that the fact that the disposition is by will makes no difference, and disposes of the argument of the appellant's vakil to that effect.

19. (1881) I L R 4 M 160.

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In *Jagannadha* v. *Papamma* (5) a distinction is drawn between the power of a widow making an adoption and that of her husband who was full owner making it and it was pointed out that *Lakshmi* v. *Subramania* (1) was a case of full owner of property while in the case under consideration the widow who had power of adoption from her husband had no power of disposition over the property and that in the absence of power given by her husband she could not impose any condition as to enjoyment of the property by the adopted son. In *Ganapathi Ayyan* v. *Savithri* (20) Shephard and Subramania Aiyar, JJ. were of opinion that where a husband gave certain directions to his widows as regards some charities and also directed them to take a child in adoption, the adoption would be conditional on the properties being set apart for the performance of the charities which would be binding on the adopted son. Shephard, J., observed "If the condition had been originated by the widows, it might not have been binding on the adopted son, but seeing that the husband's authority was qualified by a condition which he was at liberty to impose, and that the condition was insisted on when the authority was exercised, I think the adopted son is in no other position than he would be if Gopalakrishna Aiyar himself had taken him in adoption, at the same time declaring that he did so only on the condition of certain property being set apart for charity. As there would have been no adoption if the requisition of the widows had not been obeyed and as the widows were entitled and indeed bound to make that requisition, I do not think it is open to the adopted son, now to repudiate the condition. In this view of the facts, the decision in *Lakshmi* v. *Subramania* (1) applies." Subramania Aiyar, J. was of the same opinion and observed that the circumstances in which the adoption took place rendered it conditional on the alienation not being challenged by the adopted son, and the case was clearly governed by the decision in *Lakshmi* v. *Subramania* (1), *Narayanaswami* v. *Ramaswami* (21) and *Basava* v. *Lingangauda* (9). The Full Bench decision in *Visalakshi Ammal* v. *Sivaramaien* (2) settled the question so far as agreements by the natural father at the time of adoption are concerned. In that

1. (1889) I L R 12 M 490.
2. (1904) I L R 27 M 577 : 14 M L J 310 (F B).
5. (1892) I L R 16 M 400 : 3 M L J 193.
9. (1894) I L R 19 B 428. 20. (1897) I L R 21 M 10.
21. (1890) I L R 14 M 172 : 1 M L J 39.

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case a Hindu widow made an adoption in pursuance of authority given to her by her husband. An agreement was entered into between the widow and the natural father whereby it was declared that in the event of disagreement between the widow and the adopted son, certain properties which were about one-half of the properties left by the husband should be enjoyed by the widow during her lifetime and by the adopted son after her death. But for such consent of the natural father no adoption would have been made. After the adoption, owing to disagreement between the parties, a suit was filed by the natural father as next friend of the plaintiff to recover all the properties of the deceased. It was held that the provisions of the agreement were binding on the plaintiff. The Referring Judges, Sir Subramania Aiyar, Officiating Chief Justice, and Benson, J., felt some doubt as to the right of the natural father to bind the adopted son, having regard to certain observations of the Privy Council in *Bhaiya Rabidat Singh* v. *Maharani Indar Kunwar* (6), Benson, J., who delivered the judgment of the Full Bench observed as follows :—

"If the agreement is such as to be inconsistent with the fundamental idea underlying adoption and the purpose for which it is sanctioned by Hindu Law as for instance, if it deprived the adopted son of all right to the property of the adoptive father and so left him without any means of performing the necessary religious offices towards the means of his adoptive father and his ancestors, it may well be that the Courts would regard the condition as essentially repugnant to Hindu Law and would refuse to uphold it. But it would seem that a fair and reasonable disposition of the property is not essentially repugnant to Hindu Law, or the purpose for which adoption is allowed, and is nowhere forbidden by that law. Such dispositions are commonly made and are upheld by the authority of the case and the consciousness of the people. In these circumstances, I think that the Courts ought not to refuse to recognise them as binding on the minor, for whose benefit the adoption, coupled with the agreement as to the disposition of the property, was really made. It may be assumed that the natural father would not have agreed to the adoption, coupled with the disposition of the property unless it was for the benefit of his son to do so; nor would the adoptive father have taken the son in adoption except on the condition agreed to. The adoption, of course, cannot be set aside and to set aside the condition which was coupled with the adoption while maintaining the adoption would require the justification of strong grounds of legal necessity or public policy. In the present case the condition as to the property is a reasonable one and such as the Courts should uphold."

In *Ramasami Aiyan* v. *Venkata Ramaiyan* (22) a suit was filed by the adopted son to set aside certain alienations made by the widow who adopted him. The defence was that the adoption was made on the faith of a written agreement

6. (1888) I L R 16 C 556 (P C). 22. (1879) I L R 2 M 91 (P C).

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with his natural father and that none of the transactions were to be disputed as the agreement was ratified by the plaintiff after he came of age. The High Court held that the agreement was not binding on the adopted son as the ratification was made without knowledge of all the circumstances. Their Lordships of the Privy Council held that the natural father consented to give his son in adoption on the understanding that his son would inherit only about one-third of the adoptive father's property and that the adopted son validly ratified the agreement after he came of age. As regards the validity of the agreement itself apart from ratification their Lordships expressed no decided opinion but observed, "How far the natural father can, by agreement before the adoption, renounce all or part of his son's rights so as to bind that son when he becomes of age, is also a question not altogether unattended with difficulty, although the case of *Chitko Raghunath Rajadiksh* v. *Janaki* (8) certainly decides that an agreement on the part of the father that his son's interest shall be postponed to the life-interest of the widow is valid and binding. In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was not void but was at the least capable of ratification when his son became of age." It will be seen from the cases cited that the agreements sought to be enforced against a minor adopted son fall under heads (1) where the agreement is between the natural and adoptive fathers imposing terms and conditions, (2) where it is between a widow making an adoption in pursuance of a will or deed of adoption which provides for the curtailment of the rights of the boy to be adopted either by interposing a life-estate of the widow or giving portions of the property to strangers, (3) where it is between a widow acting under an authority to adopt which does not restrict the rights of the boy to be adopted but simply authorises an adoption, and reserves rights of enjoyment in herself during her lifetime or create rights in third parties. So far as cases 1 and 2 are concerned the authorities show that the adopted son would be bound by any valid restrictions the adopting father or testator may impose and as regards the third case some cases decide that she cannot create an estate beyond her powers as Hindu widow and that even in cases of her own widow's estate she cannot keep it and postpone the rights of the adopted son.

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8. (1874) 11 Bom H C R 199.

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I am of opinion that where an adoption is made by a Hindu, who, at the time of adoption had absolute power of disposal over the property, an agreement between the natural father and the adoptive father as regards alienations which the adoptive father wants to make either by a document *inter vivos* or by will binds the adopted son in all cases where such an agreement would be for his benefit and that the only question which Courts ought to consider is whether the transaction is for the benefit of the boy to be adopted. There is no reason why the rights of the boy to be adopted should be tested with reference to what his position in the family would be *after the adoption* and to see whether the adopted father could, *after the adoption*, have made the alienations which are disputed. As I have already pointed out, the right of a Hindu father to give his son in adoption is not governed by any questions of benefit to the adopted boy. For, it is perfectly competent to the natural father to give his boy in adoption to a pauper and thus deprive his son of any interest in the natural father's property. If the adopting father would not make the adoption but for the conditions agreed to by the natural father and if in spite of those conditions the adopted son would be benefited, there is no reason why the transaction should not be tested like any other agreement entered into by the natural father as guardian of his own son. In the present case the agreement is clearly for the benefit of the appellant as he gets properties of large value which he would not have got but for the adoption and there can be little doubt that he would have remained a poor man if the natural father had not agreed to the adopting father making the will and the adoption being conditional on the said disposition. There is a slight error in the decree and judgment. Plaintiffs will be entitled to mesne profits only from 15th January, 1912. The decree will be amended accordingly.

The appeal, otherwise, fails and is dismissed with costs of respondents 1 and 2.

As regards Appeal No. 461 of 1922, it is by the 2nd defendant against the decree of the Subordinate Judge directing him to pay the costs of the plaintiffs. Having regard to the facts of the case as set out in my judgment and the conduct of the 2nd defendant, I see no reason to differ from the Subordinate Judge as to costs. This Appeal also is dismissed with costs.

T. S. V. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE KRISHNAN.

Nelakanti Sundarasiva Row and others ... *Appellants** (*Plaintiffs* 3, 4 *and* 2)

v.

Ivatury Viyamma and others ... *Respondents* (*Defendants* 1 *to* 20).

Sundarasiva Row v. Viyamma.

Hindu Law—Daughters succeeding to estate of father—Partition of estate extinguishing rights of survivorship—Oral arrangement—Lists made out—Non-production of—Oral evidence—Evidence Act, S. 92—Surrender by surviving daughter—Effect on alienations made by predeceased daughter—Surrenderee when can question.

Two Hindu daughters who had succeeded to the estate of their father made an oral partition of the same and also arranged orally to extinguish their mutual rights of survivorship. It appeared from the evidence that two lists had been drawn up of the properties as divided and mention was made in them of the right of survivorship having been extinguished. The lists were not produced but oral evidence was let in regarding the same. *Held,* S. 92 of the Evidence Act did not apply and the oral evidence was admissible.

One of the daughters made alienations in respect of the properties allotted to her and died. Subsequently the other daughter executed a deed of surrender in favour of the nearest reversioner and even while she was alive a person claiming through him sought to impeach alienations made by the deceased daughter. *Held,* he was not entitled to do so during the life-time of the surviving daughter. I L R 39 M 1035 ; (1914) M W N 735 ; 41 M L J 208 followed. C M A No. 322 of 1919 dissented from. 41 M 75 referred to.

Appeal against the decree of the Court of the Additional Subordinate Judge of Cocanada in O. S. No. 28 of 1921.

B. Satyanarayana for appellants.

D. Appa Rao, G. Lakshmanna and *C. Rama Rao* for respondents.

The Court delivered the following

JUDGMENT :—Two points are raised for decision in this appeal. The first question we have to decide is whether when the two sisters Viyamma (the 1st defendant) and the deceased Peramma divided their women's estate, they did so merely with a view to convenient enjoyment, retaining the right of the survivor to take the whole on the death of one of them or whether such right of survivorship was expressly excluded by agreement between the parties. It is not denied that it was open to the sisters to do either in a manner binding between themselves. The question is one of fact and the learn-

*Appeal No. 173 of 1923. 1st April, 1925.

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ed Subordinate Judge has held that the right of survivorship was expressly excluded.

The properties originally belonged to one Perayya. He died without male issue and he had no coparceners. His estate therefore passed to his widow Rajamma. She died 25 years ago and the estate then passed to Perayya's two daughters, Viyamma and Peramma, they taking a joint daughter's estate for life. It was these ladies that divided the estate. There is no partition deed but the division is admitted by all parties, the only dispute being whether the right of survivorship between themselves was retained or expressly given up. The Subordinate Judge has accepted the evidence for the defence on the point, in preference to the contrary evidence for the plaintiff. The documents he has referred to, though not very conclusive, support the defence version so far as they go, as pointed out by him. No reason has been shown for us to take a different view of the evidence in appeal. It was, however, elicited from one of the witnesses that two lists were drawn up for the properties as divided and mention was made in them of the right of survivorship having been extinguished. Now it is contended that these lists not being produced, oral evidence cannot be allowed in proof of the transaction. The partition and the arrangement to extinguish the right of survivorship were both made orally and the list, if any, will only be, one of the pieces of evidence in favour of it. Non-production of it may go to the weight of the evidence but does not prevent other evidence being given. It is not a case to which S. 92 of the Evidence Act applies. We accept the finding of the Subordinate Judge that the right of survivorship was expressly extinguished when the partition was made.

The second question raised is one of law. The plaintiff claims the suit properties through the 2nd defendant who is the nearest reversioner to Perayya, to whom the surviving daughter Viyamma has executed a deed of surrender Ex. XVI. He contends that by virtue of the surrender the 2nd defendant has become entitled to the whole of Perayya's estate and that he is not bound by any arrangement made between the two sisters. This is a question on which we are concluded by authority in this Court and unless we differ from it and refer the question to the Full Bench, we are bound to follow it. The ruling in *Subbamma* v. *Subramaniam* (1) is exactly in point and

1. (1915) I L R 39 M 1035 : 30 M L J 260.

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lays down that when a reversioner obtains the estate through the surrender by the life-estate-holder of her estate, he is not entitled to question her alienations during her life-time but must wait till her death to do so. It was urged for the appellant that this case is no longer good law after the ruling of the Full Bench in *Vaidyanatha Sastri* v. *Savithri Ammal* (2) which held that in the case of an adoption by a widow the right of the adopted son to question the widow's alienations accrued at once overruling the decision in *Sreeramulu* v. *Kristnamma* (3) which was relied on as an authority in *Subbamma* v. *Subramaniam* (1). The ruling in *Vaidyanatha Sastri* v. *Savithri Ammal* (2) cannot, however, be taken as shaking the authority of the *Subbamma* v. *Subramaniam's case* (1) when we find two of the learned Judges on the Full Bench, the late Chief Justice Wallis and Kumaraswami Sastri, J., expressly referring and approving on that ruling and distinguishing it. The Chief Justice had affirmed the same proposition in *Singaram Chettiar* v. *Kaliyanasundaram Pillai* (4). A ruling to the contrary in C. M. A. No. 322 of 1919 was cited to us in an unreported decision of Oldfield and Seshagiri Aiyar, JJ., where it was held that a reversioner claiming by surrender from a widow was in the same position as a person adopted by a widow and could at once challenge the widow's alienations ; but this case, besides being unreported, was not followed by Wallis, C. J., and Oldfield, J., himself when it was cited to them in the case reported in *Sri Raja Suryarao Bahadur Garu* v. *Sri Raja Suryanarayana Jagapathi Bahadur Garu* (5). Oldfield, J., practically went back on his former judgment. In this state of authority I am not prepared to differ from the ruling in *Subbamma* v. *Subramaniam* (1) above referred to on a supposed analogy between the case of a son adopted by a widow and a reversioner claiming by virtue of a surrender by the widow on the ground that both of them claim from the last male holder and not from the widows.

As Kumaraswami Sastri, J., points out in *Vaidyanatha Sastri* v. *Savithri Ammal* (2) the Courts are justified in recognising the right of surrender by the widow, to impose conditions on her power based on considerations of justice, equity and good conscience. Whereas in this case the surrender was effect-

1. (1915) I L R 39 M 1035 : 30 M L J 260.
2. (1917) I L R 41 M 75 : 33 M L J 387 (F B).
3. (1903) I L R 26 M 143 : 12 M L J 197.
4. (1914) M W N 735.
5. (1921) 41 M L J 208 at 211.

ed for the purpose of defeating the alienees for consideration; the rule that till the surrenderer dies her acts cannot be questioned by the surrenderee seems to be a just and equitable rule. I would therefore follow the ruling in *Subbamma* v. *Subramaniam* (1) and hold that the plaintiff is not entitled by virtue of the surrender deed Ex. XVI to question the alienations of Peramma in favour of the defendants till Viyamma dies and the joint life-estate comes to an end.

In this view, it is not necessary to consider whether the surrender is an invalid transaction in the circumstances of this case. Both the points taken by the appellant failing, the appeal must be dismissed with costs of respondents 5 to 20.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Pavakkal ... *Petitioner** (*Counter-Petitioner*)

v.

Athappa Goundan ... *Respondent* (*Petitioner*).

Criminal Procedure Code, S. 489 (2)—Amendment of section—Maintenance ordered—Subsequent decree of Civil Court for restitution of conjugal rights—Want of bona fides *in husband—Order if to be cancelled—Discretion.*

A husband against whom an order for maintenance was passed under S. 488, Criminal Procedure Code, obtained subsequently a decree for restitution of conjugal rights. Two execution petitions filed by him were dismissed as he failed to prosecute the same diligently and it was clear from his conduct that he was not at all anxious to get back his wife to live with him on the ordinary terms of husband and wife. *Held,* as the object in getting the decree for restitution of conjugal rights was merely to get the maintenance order cancelled, and not a *bona fide* wish to live amicably with her, the Court should not exercise its discretion under S. 489 (2) and cancel the order for maintenance.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Joint Magistrate of Pollachi passed in his proceedings in Miscellaneous Case No. 48 of 1923 cancelling the order of maintenance issued by the said Court in Miscellaneous Case No. 36 of 1919.

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*Cr. R. C. No. 223 of 1924. 13th March, 1925.
(Cr. R. P. No. 192 of 1924.)

1. (1915) I L R 39 M 1035 : 30 M L J 260.

Pavakkal v. Athappa Goundan.

N. A. Krishna Aiyar for petitioner.

S. Muthiah Mudaliar for respondent.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER :—The petitioner in this case obtained an order of maintenance against the counter-petitioner in 1919. In 1920 the counter-petitioner filed a suit for restitution of conjugal rights and obtained a decree on 30th June, 1922. He put in an application for execution on 28th August, 1922. On a statement being filed by the petitioner the execution petition was dismissed. Another execution petition was presented on 24th February, 1923, and it was dismissed as no notice was served on the petitioner. Finally he put in a third petition on 5th April, 1923, and the order on that was as follows :—"The defendant is not willing to live with the plaintiff in the room proposed to be allotted to her. The petitioner does not press the petition. Hence dismissed." I think it is clear from the course of the proceedings in execution that the counter-petitioner was not at all anxious to get back his wife to live with him for even on the last application in which the execution of the decree came up for consideration it appears that he proposed that the petitioner should live in a separate room. The counter-petitioner has a second wife and children by her and when he obtained a decree for the restitution of conjugal rights it was not open to him to impose terms upon his wife. If he wanted her to come back to him, he must accept her and live with her on the ordinary terms as husband and wife and not keep her confined to one portion of the house. The counter-petitioner's object in getting the decree for the restitution of conjugal rights is obviously not *bona fide* and he did not mean to allow his wife to live with him without restrictions. It was found in 1919 that he ill-treated her and her children, without allowing them food, and the obvious conclusion would be, that this suit was filed by him in order to evade the order of maintenance and not *bona fide* in order to recover possession of his wife. Under S. 489 (2) of the Criminal Procedure Code, as recently amended, it is competent for a Magistrate to cancel or vary an order of maintenance, if he thinks that it should be cancelled or varied in consequence of any decision of competent Civil Court. Undoubtedly if a Civil Court had given to the husband a decree for restitution and the husband *bona fide*

wished to execute that decree and the wife refused that would be a good ground for cancelling the order of maintenance under S. 488; but in the circumstances in this case, where I am satisfied that the counter-petitioner did not wish to have his wife back and his object in getting the decree was merely to get the maintenance order cancelled, I think that in the exercise of the discretion under S. 489 (2) it would be wrong to cancel the order for maintenance. The Joint-Magistrate in cancelling the order gives no reason except that he follows the ruling in *In re Bulakidas* (1), which was decided before the Code was amended. Another case has been cited before me but I need not refer to it in any detail for this particular point, namely, the discretion of the Court under S. 489 (2) was not dealt with there.

The petition is allowed and the maintenance order is restored.

T. S. V. *Revision Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Sri Parankusam Venkayya Garu and others ... *Appellants* (Plaintiffs)*

v.

Bandaru Satyanarayanamurthi (minor) by mother and guardian Thayaramma and others ... *Respondents (Defendants Nos. 1 to 3, 6, 7, 16, 37, 8 to 12, 19, 23, 30, 35, 40, 46, 56, 57 and 61).*

Venkayya v. Satyanarayanamurthi.

Civil Rules of Practice, R. 278 (b)—Costs of suit—Suit dismissed for default to pay stamp duty—Costs in case of—Pleadings filed and issues framed in the suit—Effect.

Where a suit has been dismissed for default of payment of stamp duty, and there has been no trial of the suit, although the pleadings have been filed and issues framed, the case comes under R. 278 (*b*) of the Civil Rules of Practice, and the fees should be calculated in accordance with that rule. In such a case the costs ought not to be taxed as if the suit had been dismissed after contest.

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*Appeal No. 11 of 1925. 4th February, 1925.

1. (1898) I L R 23 B 484.

Venkayya v. Satyanarayanamurthi.

Appeal against the decree of the Court of the Additional Subordinate Judge at Ellore, so far as it relates to costs in O. S. No. 14 of 1922 (O. S. No. 104 of 1920 on the file of the Sub-Court, Ellore).

G. Lakshmanna and *V. Viyyanna* for appellants.

B. Satyanarayanamurthi for respondents.

The Court delivered the following

JUDGMENT :—This appeal relates solely to costs. The plaintiff brought a suit for partition impleading his co-sharer, the 1st defendant, and a large number of defendants who are alleged to be in possession of the land sought to be partitioned. The Subordinate Judge held that the plaintiff ought to have paid additional stamp duty in respect of his claim against the defendants other than the 1st defendant. The plaintiff did not pay this amount and his suit was dismissed with costs. It appears that in the decree the costs have been taxed as if the suit had been dismissed after contest ; but inasmuch as the suit has been dismissed for default of payment of stamp duty and as there has been no trial of the suit although the pleadings have been filed and issues framed, the case would appear to come under R. 278 (*b*) of the Civil Rules of Practice ; and the fees should be calculated in accordance with that rule.

It also appears that separate costs have been awarded to a very large number of defendants, and there is no provision for this in the judgment. It would appear that so far as the separate costs are concerned, the 1st defendant would be entitled to his costs and the other defendants jointly to a second set of costs.

The decree must be set aside and remitted to the Lower Court for framing a fresh decree in accordance with the above remarks.

No order as to costs.

A. S. V. *Decree set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Gokarakonda Venkatasubbiah ... *Petitioner in both petitions** (*Petitioner—1st Defendant*)

v.

Daliparthi Lakshminarasimham... *Respondents in C. R. P. No.* 961 *of* 1923 (*Cr. Petitioners—Plaintiffs*).

Venkatasubbiah *v.* Lakshminarasimham.

Civil Procedure Code, O. 9, *R.* 7—*Scope of—Defendant declared* ex parte—*Plaintiff's evidence taken and suit adjourned—Defendant's right to appear at adjourned hearing and proceed with his case—If* ex parte *order should be set aside.*

On the hearing day of a suit, a defendant who had already filed his written statement, was absent and the Court declared him *ex parte*. The evidence for the plaintiff was adduced on that day and the hearing was adjourned to another date. On that day, the defendant appeared and wanted to put forward his evidence. *Held*, the *ex parte* order only covered the period during which the party was actually absent and did not act as a bar to his resuming appearance in the suit at the stage in which it then was.

O. 9, R. 7, Civil Procedure Code, applies to a party who wishes to be relegated back to the position which he would have been in if he had appeared at the previous hearing at which he was absent, and who wishes the proceedings taken in his absence to be taken over again in his presence, so that he may regain the opportunities of cross-examination, etc., which he lost by his absence.

Petitions under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the orders of the Court of the Additional Subordinate Judge of Kistna at Masulipatam, dated 13th October, 1923, in I. A. No. 136 of 1923 in O. S. No. 11 of 1923 and in I. A. No. 135 of 1923 in O. S. No. 32 of 1923 respectively on its file.

M. Patanjali Sastri for petitioner.

V. Krishna Mohan, Ch. Raghava Rao and *P. Bapiraju* for respondents.

The Court delivered the following

JUDGMENT :—These two Civil Revision Petitions are presented against the orders of the Lower Court declining to set aside the *ex parte* order passed against the petitioner. The petitioner was the 1st defendant in two suits, O. S. No. 11 of 1923 and O. S. No. 32 of 1923. He has appeared in the suits and put in written statements. On one of the hearing days, namely 27th September, 1923, he was absent and the Court "declared him *ex parte*." The evidence for the plain-

*C. R. P. Nos. 961 and 962 of 1923 27th February 1925.

Venkatasubbiah v. Lakshminarasimham.

tiff was adduced on that date and the hearing was adjourned to 13th October, 1923. On that day the 1st defendant appeared and put in a petition under O. 9, R. 7, praying that the *ex parte* order against him may be set aside. The Lower Court dismissed that petition, and the present Civil Revision Petitions are filed against that order. The decree in the case has not yet been passed as further trial has been stayed by this Court, so that no question of setting aside an *ex parte* decree has yet arisen.

The plea put forward by the 1st defendant for his absence was sickness and want of money. His allegations were challenged by the plaintiffs in the suits and the Lower Court refused to believe these allegations and found that the 1st defendant had not shown sufficient cause for his absence to justify its setting aside the order under O. 9, R. 7. The Lower Court was entitled to come to that conclusion, and there is no lack of jurisdiction or irregular exercise of jurisdiction in its order. On the face of the record I find there is no reason for interference in revision.

The petitioner, however, has stated that the Subordinate Judge's view is that he, having been once declared *ex parte* in the suits, is debarred from subsequently appearing, even if he was prepared to resume the case from the stage it had reached and not ask that the proceedings which went on in his absence be cancelled, *i. e.*, it is suggested that the Subordinate Judge's view is that the *ex parte* order passed by him on 27th September, 1923, prevents the 1st defendant from appearing at all again in the suits until and unless that order is set aside and that *ex parte* decrees must follow if the plaintiffs have made out any case at all. The respondents to these petitions do not challenge but uphold this view. The petitioner before me states that all he now wants is to be allowed to put forward his evidence, the suits having merely reached the point at which the plaintiffs' evidence has been closed. Is he debarred from doing that or is he not ? I have had this point argued before me in order to decide for the guidance of the Lower Court whether the *ex parte* order does or does not now bar the petitioner from resuming appearance in the suits at the stage at which they now are. The point is a novel one and there is an absence of authority on it. But my view is that the petitioner is not so debarred, in other words, that the *ex parte* order only covers the period during which the party was actually absent and does not act as a bar to his subsequent appearance. Res-

pondents contend that this view is opposed to O. 9, R. 7; but I do not think so.

Venkatasubbiah v. Lakshminarasimham.

One cardinal principle to be observed in trials by a Court obviously is that a party has a right to appear and plead his cause on all occasions when that cause comes on for hearing. It follows that a party should not be deprived of that right, and in fact the Court has no option to refuse that right, unless the Code of Civil Procedure deprives him of it. Is there any rule of procedure then which gives power to a Court to say to a party when he appears to plead his case that it cannot hear him because at the previous hearing he was absent? I do not so read O. 9, R. 7. That applies to a party who wishes to be relegated back to the position which he would have been in if he had appeared at a previous hearing at which he was absent, and who wishes the proceedings taken in his absence to be taken over again in his presence, so that he may regain the opportunities of cross-examination, etc., which he lost by his absence. After all "*ex parte*" only means that the party has not been heard because he was absent and the adjournment of the hearing "*ex parte*" in the words of R. 7 applies only to the hearing on the particular day when that hearing and adjournment "*ex parte*" was made. I do not see any ground for extending its operation to all subsequent hearings of the suit.

The mere physical appearance of a party or his pleader has no special effect on the procedure in the suit. For example, a party who has no special interest in a particular part of the case being heard and does not intend to take any part in that part of the trial may surely absent himself on the days when that part of the trial is being heard without incurring as a penalty his total exclusion from the case. He no doubt forfeits any opportunities he would otherwise have had of taking part in those days' proceedings, but I cannot see how he would forfeit anything more, or that he could, by any rule of procedure, be prevented from appearing in future when the part of the suit in which he is interested comes on for hearing. Mere absence on certain days does not make him *ex parte* for the rest of the trial but only *ex parte* for those hearings at which he was absent. He is not prevented from appearing later and proceeding with the case at the stage at which it then is. His right to come on at that stage would, of course, depend on the stage at which the trial then stood.

Venkatasubbiah v. Lakshminarasimham.

In the present case if the plaintiff had closed his case and the petitioner had been called upon to produce his case and he was absent and therefore made *ex parte* as regards the presentation of his case, I take it that he would not be allowed to come on later unless he got the *ex parte* order set aside under O. 9, R. 7. But if the plaintiff had closed his case and the petitioner had not been called upon to produce his case, there could be no *ex parte* order against him with reference to his presentation of his case, which had to be set aside. Therefore he could appear and go on with his case on the adjourned date from the stage at which it stood.

There is a paucity of authority on the point. The learned vakil for the petitioner has drawn my attention to two rulings of the Allahabad High Court—*Mannu* v. *Tulsi* (1) and *Bhagwat Prasad Tewari* v. *Muhammad Shibli* (2). They support the view I have taken. A case reported in *Satyendra Nath* v. *Narendra* (3), though slightly different on the facts, was decided on the same principle. With these remarks, I dismiss these petitions with costs, one set to each plaintiff.

T. S. V. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Appasamy Aiyar ... *Petitioner** (*Accused*).

Appasamy Aiyar, In re.

Criminal Procedure Code, Ss. 195, 476—Amendment of—Sanction given under old Code—Trial commenced but not completed before amending Act came into force—Fresh complaint—Necessity for.

A Criminal Court took cognizance of an offence for perjury on a sanction granted to a person before the Criminal Procedure Code Amendment Act came into force, but the trial was not completed till after that date. A charge was then framed against the accused and he sought to revise the order framing the charge and to quash all proceedings in connection therewith on the ground that no written complaint by the Court was filed, as required under the amended provisions of the Code. *Held,* the proceedings were perfectly valid and no complaint by the Court was necessary. 19 L W 392 and Cr M P No. 606 of 1924 followed.

Per Wallace, J. :—In such cases it is essential not to confuse "cognizance" with "jurisdiction." Once a Court is properly seized of a case, no amendment of the law except an amendment which took away the jurisdiction of the Court to try the offence can affect the Court's authority to proceed with the trial.

Per Madhavan Nair, J. :—An alteration in the law of procedure relating to the grant of sanction cannot invalidate proceedings validly begun under the

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*Cr R C No. 271 of 1924
(Cr R P No. 227 of 1924). 12th December, 1924.

1. (1921) 20 A L J 39. 2. (1922) 20 A L J 270. 3. (1925) 39 C L J 279.

old procedure. If the intention of the legislature was to annul such proceedings also, it would have expressed such intention in appropriate language.

Appasamy Aiyar, *In re.*

Petition under S. 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order framing charge, dated 5th March, 1923, in C. C. No. 37 of 1923 on the file of the Court of the First Class Sub-divisional Magistrate of Usilampatti and for quashing all proceedings in the said C. C. No. 37 of 1923.

P. S. Narayanaswami Aiyar for petitioner.

The Pubic Prosecutor on behalf of the Crown.

The Court made the following

Wallace, J.

ORDER :—*Wallace, J.* :—The question raised in this revision petition is whether when a Criminal Court has taken cognizance of an offence for perjury, before the amendment of the Criminal Procedure Code, on a sanction order to a private individual granted before the Code was amended, but has not completed the trial before the amended Code, which abolished all such sanctions, came into force, the trial can go on without fresh complaint under the amended provisions of S. 476, Criminal Procedure Code. The point is one of first impression and is not very easy to decide. The petitioner is the accused in the perjury case. The First Court had refused the sanction. The Lower Appellate Court granted it. The petitioner moved the High Court to revoke that sanction after the amended Code came into force. The High Court held that, under the amended Code, such an application would not lie and dismissed it. The petitioner complains that the amendment of the Code should not have been used to deprive him of his opportunity of moving that the sanction ought to be set aside and that, if the amended procedure is to govern his case, it must be held to govern it from the beginning. Had a complaint been put in to the Lower Court under the new Code, the petitioner would have had a right of appeal to this Court. As the Lower Court's order is merely one granting his sanction, the petitioner, by the amendment of the Code, is now left without a remedy in the nature of appeal or revision against that Order. That, however, is not the point really before us now ; it has been settled already by the High Court's Order. The point before us now is whether the trial which has been properly begun on a sanction order must now be dropped owing to the amendment of the Code. Our attention has been drawn by both sides to two recent rulings of this Court—neither of them, however, is exactly on all fours—

Appasamy Aiyar, *In re.*

Wallace, J.

which are reported in *Nataraja Pillai* v. *Rangaswami Pillai* (1) and *Sesha Aiyar* v. *The Public Prosecutor* (2). In the latter case, a Bench held that the production of sanction was a mere matter of procedure. There the application was to revoke a sanction granted under the old Code. The learned Judges referred to the *Nataraja Pillai's case* (1) and agreed with the view there expressed, that no party had a vested right of appeal or revision in the matter of getting a sanction revoked. *Nataraja Pillai* v. *Rangaswami Pillai* (1) case was the converse case in which the party moved the High Court to grant a sanction which the Lower Court refused. I was a party to that decision. The *Nataraja Pillai* v. *Rangaswami Pillai* (1) case looks at the point from the standpoint of a complainant, while the *Sesha Aiyar* v. *The Public Prosecutor* (2) case looks at it from the standpoint of an accused, but there is no essential difference in the conclusion that the matter is one entirely of procedure, and it is plain that the old S. 195 did not draw any appreciable distinction between the position, as accused or complainant, of the parties in the matter of moving the High Court either to grant a sanction refused or to revoke a sanction granted.

In order to decide as to whether a trial founded on a sanction and properly begun on a procedure which has been altered by the amended Criminal Procedure Code can now go on, it is essential not to confuse 'cognizance' with 'jurisdiction.' Once a Court is properly seized of a case, I do not see that any amendment of law except an amendment which takes away its jurisdiction to try the offence can affect the Court's authority to proceed with the trial. To hold that an amendment of the procedure of trial under the Code automatically brings to an end all trials founded on the original procedure—which is really the contention of the petitioner—is not a conclusion which appears to me justified either in law or in common sense. The consequence of an amendment of procedure is not that all matters properly begun under the old procedure collapse and have to be begun again under the new procedure, but that they shall be continued under the new procedure from the time when the new procedure came into force. If that were not the intention of the legislature, I think it was bound to have said so. Cognizance founded on a sanction order was merely a barrier which had to be crossed before

1. (1923) I L R 47 M 384 : 46 M L J 274.
2. (1923) 19 L W 463.

a Court reached the stage of trial, and, once that barrier had been crossed, I do not see what authority short of interference by a Court of Appeal in revision empowered to cancel the sanction order, or legislation *ad hoc* can reverse the process. This is the view taken by a learned Judge of this Court in Criminal Miscellaneous Proceedings No. 606 of 1924 and this also the view stated, although without reasons in *Muthia Goundan* v. *Chinna Nallappa Goundan* (3) to which also I was a party.

The petitioner appeals to some observations of mine in *Nataraja Pillai* v. *Rangaswami Pillai* (1) . that "obviously the Court has power to discharge or acquit an accused person of a charge which requires previous sanction if, in the course of the trial and before judgment is pronounced, it is brought to its notice that no sanction has been obtained and I can see no difference between such a case and a case where the sanction on which the trial is proceeding has been set aside during the trial," but these really do not help him, because in such a case, the prosecution was either not properly begun at all under the old Procedure, or, if it had properly begun under the old Procedure, it has also properly come to an end under the old Procedure by the revocation of the sanction. What the petitioner sought to do in that case was to revise the old Procedure after the new Procedure had come into force. I can, therefore, see no reason to interfere in revision in this case and dismiss the petition.

Madhavan Nair, J.

Madhavan Nair, J.—The facts of this case are not disputed. Sanction under S. 195 of the old Criminal Procedure Code to prosecute the petitioner for perjury was refused by the first Court. The Appellate Court granted the sanction. An application filed by the petitioner to revoke that sanction after the amended Code came into force was dismissed by the High Court on the ground that under the amended Code such an application would not lie. Proceedings against the petitioner began on the sanction granted under the old Code, but were not completed before the amended Code came into force, and, now a charge has been framed against him for offence under S. 193 of the Indian Penal Code. The present petition is to revise the order framing the charge and for quashing all proceedings against the petitioner in connection with this charge on the ground that such proceedings are bad in law inasmuch

1. (1923) I L R 47 M 384 at 394 : 46 M L J 274.
3. (1923) 19 L W 392.

Appasamy Aiyar, *In re.*

Madhavan Nair, J.

as those were started without a written complaint by the Court, as is now required under the new Code of Criminal Procedure.

The point arising for our consideration is whether the trial which has been properly begun on a sanction order granted to a private individual under the old Code and the charge framed against him should now be considered bad in law, because of an alteration in the procedure laid down by the amended Code. The learned vakil for the petitioner has relied upon two decisions of this Court, namely *Nataraja Pillai* v. *Rangaswami Pillai* (1) and *Sesha Aiyar* v. *The Public Prosecutor* (2) in support of his argument. In *Nataraja Pillai* v. *Rangaswami Pillai* (1) an application was made to the High Court to set aside an order revoking a sanction granted under S. 195 of the old Code of Criminal Procedure. It was held that such an application does not lie after the amendment of the Code and that no party has a vested right of appeal or revision in getting a sanction order revoked. In *Sesha Aiyar* v. *The Public Prosecutor* (2) it was held that an application made to the High Court after the amended Code has come into force to revoke a sanction granted under S. 195 of the old Code is not maintainable. The learned Judges expressed the view that "the production of a sanction for the cognizance of certain specified offences was purely a matter of procedure," and also held, following *Nataraja Pillai* v. *Rangaswami Pillai* (1), that no private party has a "vested right of appeal in a sanction matter which would be preserved in spite of the amendment of the law." Relying on these decisions it has been argued that, since the grant or the revocation of sanction is purely a matter of procedure which is affected by an alteration of the law, the proceedings commenced in pursuance of a sanction granted under the old Code are also bad in law in view of the alteration in the procedure laid down in the amended Code. It appears to me that neither of the two decisions above referred to deals with this question now raised before us.

On the other hand, the decisions in *Muthia Goundan* v. *Chinna Nallappa Goundan* (3) and Criminal Miscellaneous Petition No. 606 of 1924 brought to our notice by the learned Public Prosecutor have a direct bearing on the question and the latter one suggests the correct principle to be applied in the

1. (1925) I L R 47 M 384 : 46 M L J 274.

2. (1925) 19 L W 463.

3. (1925) 19 L W 392.

Appasamy Aiyar, *In re.*

Madhavan Nair, J.

present case. In *Muthia Goundan* v. *Chinna Nallappa Goundan* (3) the learned Judges, Ramesam and Wallace, JJ., express their view that the new Criminal Procedure Code Amending Act does not affect the complaint filed under the Act before the amendment. In Criminal Miscellaneous Petition No. 606 of 1924 it was held by Krishnan, J. that "the amendment of the Criminal Procedure Code did not affect complaints already filed on sanction properly obtained. * * * S. 195 requires the sanction only to enable the Court to 'take cognizance' of certain offences and, once the case is launched and cognizance has been taken by the Magistrate, the fact that he commits the case to the Sessions for trial does not affect the question." It seems to me that this decision lays down the correct principle. The production of sanction, which is purely a matter of procedure, is a pre-requisite of certain prosecutors [see *Sesha Aiyar* v. *The Public Prosecutor* (2)]. Sanction is required only to enable the Court to take cognizance of certain offences and, when once the case is launched and cognizance has been taken by the Magistrate of any offence nothing short of an amendment which specifically takes away the jurisdiction of the Court to try the offence can affect the right of the Court to go on with the trial according to law.

In my view, an alteration in the law of procedure relating to the grant of sanction cannot invalidate proceedings validly began under the old Procedure. If the intention of the legislature was to annul such proceedings also, then it would have expressed such intention in appropriate language. Applying the principle indicated in Cr. M. P. No. 606 of 1924, I would hold that the proceedings of the Magistrate in this case are not *ultra vires* and illegal.

I would, therefore, dismiss this petition.

T. S. V. *Revision Petition dismissed.*

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2. (1923) 19 L W 463. 3. (1923) 19 L W 592.

PRIVY COUNCIL

(On Appeal from the Chief Court of Lower Burma.)

PRESENT :—LORD ATKINSON, LORD SHAW AND LORD DARLING.

Maung Bya and another ... *Appellants**

v.

Maung Kyi Nyo and others ... *Respondents*

P. C.

Maung Bya *v.* Maung Kyi Nyo.

Nuisance—Blocking of canal by lower land-owner—Consequent flooding and damage to owner of land higher up the canal—Liability of lower owner—Law in Burma same as in England.

A raised road or "bund" traversed depressed ground, through which flowed a canal, properly provided with a gap, or "eye" for the flow and a bridge over the canal. The owner of land lower down the canal caused this gap or "eye" to be filled up, thus blocking up the course of the water in the canal at that spot, which water overflowed and flooded land higher up the canal course and damaged the crops there. *Held,* the lower owner was guilty of an actionable nuisance for which he was liable in damages to the higher owner.

Bickett v. *Morris,* 1 H L 47 ; *Menzies* v. *Breadalbane,* 3 Bligh (N S) 414 ; *Orr Ewing* v. *Colquhoun,* 2 App C 839 ; *Nield* v. *L and N W Ry Co,* 10 Exch 4; *King* v. *Commissioners for Pagham,* 8 B & C 355 ; *Whalley* v. *L and Y Ry Co.,* 13 Q B D 131 ; *Rylands* v. *Fletcher,* 3 H L 330 referred to.

It is immaterial in such cases to enquire how or by whom the waterway thus blocked up was originally formed or built, or whether it was a natural or an artificial watercourse.

Though, in the case of a natural watercourse, the various riparian owners are entitled, as an incident of their ownership, to the unimpeded flow of the water and to its reasonable enjoyments it passes in its natural course through the riparian lands, and, on the other hand, in the case of an artificial water-course, such owners' right to the water-flow rests upon either prescription or grant from or on contract with the owner of the land from which the water was artificially brought, yet a watercourse, originally artificial, may have been made under such circumstances and used in such manner that a riparian owner may have over it, apart from grant or prescription or contract, the same rights as over a natural stream.

Rameshur Pershad Narain Singh v. *Koonji Behari Pattuk,* 4 App Cas 121 ; *Kensit* v. *Great Eastern Railway Co.,* 27 Ch D 122 ; *Sutcliffe* v. *Booth,* 32 L J Q B 136; *Holker* v. *Porritt,* L R 8 Exch 107 ; *Bailey and Co.* v. *Clark, Son and Morland,* (1902) 1 Ch 649 referred to.

In such cases, the liability of the defendant in damages for the wrong done does not depend on the question whether he made a profit by his act.

The law in Lower Burma as to the flow of, and flooding by, fresh water rivers and watercourses or trespasses on the bed or soil of such rivers, is the same as in England.

Abdul Hakim v. *Ganesh Dutt,* I L R 12 C 323 ; *Ramaswami Naicker* v. *Rasi Naicker,* I L R 38 M 149 distinguished.

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*P C Appeal No. 106 of 1924. 30th June, 1925.

P. C.

Maung Bya v. Maung Kyi Nyo.

Appeal from a judgment of the Chief Court of Lower Burma (Maung Kin and Duckworth, JJ.), dated 31st May, 1921, reversing the decree of the District Judge (Po Bye, Esq.), dated 27th September, 1919, awarding to the appellants Rs. 8.82148 cents, as damages and costs against the respondents.

The material facts and arguments appear from the judgment of their Lordships.

G. Lawrence, K. C. and *Besley* for appellants.

Harney, K. C. and *Leach* for respondents.

30th June, 1925. The Judgment of the Board was delivered by

Lord Atkinson.

LORD ATKINSON.—This is an appeal from a judgment of the Chief Court of Lower Burma (Maung Kin and Duckworth, JJ.) dated 31st May, 1921, allowing the appeal of the respondents against a decree of the District Court of Pyapon (Po Bye, District Judge), dated 27th September, 1919, by which the said District Judge ordered the respondents to pay the appellants the sum of Rs. 8.821–48 by way of damages and the costs of the suit.

The appellants in the second paragraph of their case allege that "the question raised is whether in Burma a lower agricultural owner is liable to compensate a higher agricultural owner for damage to crops by inundation caused by the blocking of a canal running through the lands of the lower owner by which the water would otherwise have been drained from the land of the higher owner."

In a sense, but only in a limited sense, is that statement accurate. Save in the second and third of the reasons for their appeal it is put forward that the law applicable in Lower Burma to the flow of and flooding by fresh-water rivers or watercourses, whether they be natural or artificial, or trespasses on the bed and soil of such rivers and streams, is different from the law as applied to similar subjects in England. A little consideration of the two cases cited [*Abdul Hakim* v. *Ganesh Dutt* (1), and *Ramaswami Naicker* v. *Rasi Naicker* (2)] will show that there is no conflict between the two systems of law, and it was not contended in argument on the hearing of the appeal that the general principles of the laws of England touching the matters above mentioned did not apply to Lower Burma.

1. (1885) I L R 12 C 323.
2. (1913) I L R 38 M 149 : 25 M L J 276.

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The action out of which the appeal has arisen was brought by the two appellants (who are husband and wife) in the District Court of Pyapon, Lower Burma, to recover damages amounting to Rs. 13.448 for the wrongful flooding by the acts and procurement of the respondents of a large tract of paddy lands 68,541 acres in extent, belonging to the appellants, whereby the productivity of these lands was, in the season in which the acts were done, so reduced that they only yielded 3,867 baskets of paddy instead of their normal yield of about 17,300. The District Judge decided in favour of the appellants and awarded them Rs. 8.821-48 damages. The Chief Court on appeal reversed the decree of the District Judge, and on grounds which appear to the Board strange, and are indeed unsound, decided in the respondents' favour.

Several maps of the locality were given in evidence ; the two most intelligible and useful were the first, a map marked Ex. A, and the second, dated in the year 1906—7, described as Ex. 2A. With almost perverted ingenuity the draftsman of these and, indeed, of many other maps, has omitted to place upon the face of them any indication of the points of the compass, so that in dealing with them one is obliged to use the words left and right, and top and bottom of the maps in order to endeavour to fix any point or object. A study of these two maps, however, enables one to get an idea of the terrain, especially as the map of 1906 represents what was the nature of the tract of country with which the case is conversant before any of the works were executed, the misuse of which is alleged to have caused the flooding, and as the second map, Ex. A, shows what were the features of that tract after these works had been executed. The map of 1906-7 purports to be a plan 126 of Sakangyi circle, Bogale township. It corresponded closely with the map, Ex. A.

Many rivulets or watercourses are depicted upon it. They correspond with those depicted upon Ex. A. The main difference between them is that on the latter a prolongation of the watercourse from Singu Chaung is to be found which is absent from 2A of 1906-7.

The watercourse, styled extravagantly the canal, represented on A, and lettered A, B, C, D, G, H, emptying into the sea creek at A is precisely the same watercourse as is represented on the map of 1906-7, coming from Singu Chaung and debouching into the same sea creek at the same place. No

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doubt the so-called canal is represented as being something broader than the corresponding stretch of watercourse on the map of 1906, but the fact of vital importance is that all the rivulets or watercourses are depicted as of the same width and kind, and resemble each other in all respects. There could be no object in depicting on this map a watercourse as existing where none, in fact, existed when the map was made. The map therefore absolutely refutes the contention put forward with some hardihood on behalf of the respondents, that before the canal was made its site was a mere depression in the earth surface through which no stream ran ; but in which, after heavy rain, stagnant water for a time accumulated. Now what was done in 1913-4 was, in their Lordships' view, the widening a little, and deepening a little, possibly trimming the banks a little, of an existing ancient fresh-water natural watercourse, not in their view the making by excavation and such work of a watercourse, styled a canal, where none such theretofore existed.

The lands of the first respondent lie to the left-hand side of the map, between the lands of the appellant and the sea creek Kyonkan Chaung. On the map Ex. A they are numbered 17, 18, 30, 31, 32. The other respondents are merely cultivators in the village of Kamakalu. The lands of the appellants are comprised in three kwins lying to the right of the first respondent's lands and named respectively Kasaung Ngotto (both marked on Ex. A), and Sakangyi South and Kasaung Ngotto (both marked on map B). They are numbered separately 1—14 on map marked B. In addition to the refutation of the respondents' suggestion as to there never having been formerly a rivulet or watercourse where the canal exists now, one finds that several witnesses depose to there having been a small Yo where the bridge was afterwards erected, that a jungle log was placed across the Yo before the bridge was built, which certainly suggests to their Lordships that this log was designed to fulfil the function of stepping stones to enable people to cross the stream, possibly dry-shodded and in safety.

In the present case the early history of this *locus in quo*, this large tract of paddy land intersected with rivulets of water, large or small, is very vague. The evidence as to what were the rights and obligations which the inhabitants owed to each other in reference to these watercourses, the local law as to their regulation, their enjoyment and protection, is so con-

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fused and contradictory that it has occurred to the Board that it would possibly be better to reverse the usual order of procedure and, before dealing with the evidence of the witnesses, the facts proved, and the rulings of the Judges, to demonstrate, by reference to four or five well-known English cases, what the well-established law is touching the flow of and flooding by rivers and watercourses, the diminution of their currents or the diversion of their course, the trespass upon their beds, the incursion of the sea upon one's land, and the measures the owner may take to protect himself, and then by applying a coherent and consistent body of principles to the facts proved, thus endeavouring to solve in harmony with English Law the issues raised, considering any local law which may modify the English Law.

The first of these cases is *Bickett* v. *Morris* (3). It deals with trespass on the alveus or bed of a fresh water watercourse.

The appellant obtained, in consideration of £10 paid by him, permission from a riparian owner on the river Kilmarnock, in Ayrshire, to extend a certain wall then standing on the respondents' premises on to the alveus of the river as far as was indicated by a red line drawn on an identified ordnance map. The appellant proceeded to build the wall, but, as the respondents alleged, not in the direction indicated. The respondents accordingly applied for an interdict against him, and brought an action for a declaration that the appellant had no right to erect buildings on the solum of the river beyond the red line aforesaid. Lord Cranworth, in delivering judgment, dealt at length with the legal points raised in the discussion. At page 58 of the report he said :—

"By the law of Scotland, as by the law of England, when the lands of two conterminous proprietors are separated from each other by a running stream of water, each proprietor is *prima facie* owner of the soil of the alveus or bed of the river *ad medium filum aquae*. The soil of the alveus is not the common property of the two proprietors, but the share of each belongs to him in severalty, so that if from any cause the course of the stream should be permanently diverted, the proprietors on either side of the old channel would have a right to use the soil of the alveus, each of them, up to what was the *medium filum aquae*, in the same way as they were entitled to the adjoining land. The appellant contended that as a consequence of this right every riparian proprietor is at liberty at his pleasure to erect buildings on his share of the alveus so long as other proprietors cannot show that damage is thereby occasioned or likely to be occasioned to them. I do not think that is a true exposition of the law."

3. L R 1 H L 47.

Lord Cranworth then dealt with the difficulty, almost the impossibility, of determining in anticipation what damage may result in flood time by the erection of buildings on the alveus of a stream, and speaking of the riparian proprietors, put their case succinctly in these words :—

"They are entitled to say 'We have all a common interest in the unrestricted flow of the water, and we forbid any interference with it.' This is a plain, intelligible rule, easily understood and easily followed, and from which I think your Lordships ought not to allow any departure."

Lord Westbury, at page 61 of the report, thus expresses himself :—

"When, however, it is said that proprietors of the bank of a running stream are entitled to the bed of the stream as their property *usque ad medium filum*, it does not by any means follow that the property is capable of being used in the ordinary way, in which so much land uncovered with water might be used ; but it must be used in such a manner as not to affect the interest of riparian proprietors of the stream. Now the interest of a riparian proprietor in the stream is not only to the extent of preventing it being diverted or diminished, but it would extend also to prevent the course being so interfered with or affected as to direct the current in any different way that might possibly be attended with damage at a future period to another proprietor."

So much as to interference with the alveus which is stated in the headnote of this case to be *sacred*.

In *Menzies* v. *Breadalbane* (*Earl of*) (4), it was held that a proprietor on the bank of a river, having commenced the building of a mound, which, according to the opinion and report of an engineer, would, if completed, in times of ordinary flood throw the waters of the river on to the grounds of a proprietor on the opposite bank so as to overflow and injure them, should be restrained by perpetual interdict from the further erection of any bulwark or other work which might have the effect of diverting the stream of the river in time of floods, *i. e.*, ordinary flood, from its accustomed course and throwing the same upon the lands of the appellant. Lord Eldon, in delivering the judgment of the House (at page 418) said :—

"It is unnecessary to trouble your Lordships with any observations on the law of England.....because it is clear beyond a possibility of doubt that by the law of England such an operation" (*i. e.*, as that complained of) "could not be carried on.. ...."

At page 419 he then said :—

"But let us see what is said on this subject by the institutional writers on the law of Scotland."

He then quotes with approval the following passage from Erskine's *Institutes* :—

4. 3 Bligh (N S) 414.

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"When a river threatens an aleration of the present channel by which damage may arise to the proprietor of the adjacent or opposite ground it is lawful for him to build a bulwark *ripae muniendae causa* to prevent the loss of ground that is threatened by that encroachment."

Lord Eldon then proceeds :—

"so that the proprietor whose lands are threatened to be washed away, may, for the purpose of protecting his own property in a case of that description, raise a bank for his own security, but this bulwark must be so executed as to prejudice neither the navigation nor the grounds on the opposite side of the river."

This right of navigation, however, is not a right of property. It is simply a right of way which must not be interfered with. [*Orr Ewing* v. *Colquhoun* (5)].

In *Nield* v. *The London and North-Western Railway Company* (6), the defendants owned a canal which was threatened with an overflow into it of flood water from a neighbouring river, and, fearing damages to their premises situated on the banks of the canal, placed across the canal some planks rising up higher than the level of the water in the canal, which, being obstructed when the flood increased, rose till it flooded the plaintiff's premises. In an action brought by the plaintiff to recover damages for this injury, it was held that the defendants were not liable on the ground that they had not brought on to the plaintiff's premises the water which did the injury, and that there was no duty on the owners of a canal analogous to that resting on the owners of a natural water-course not to impede the flow of the water down it.

So much as regards fresh water streams. As regards the right of an owner of land whose land is exposed to the inroads of the sea, the case of *The King* v. *The Commissioners of Sewers for Pagham* (7), many times approved of, is a distinct authority. In delivering his judgment that most able and learned Judge, Bayley, J., stated the rule of law in these words :—

"Every land-owner exposed to an inroad of the sea has a right to protect himself, and is justified in making and erecting such works as are necessary for that purpose, and the Commissioners (*i. e.*, the defendants) may erect such defences as are necessary for the land entrusted to their superintendence. If, indeed, they make unnecessary or improper works, not with a view to the protection of the level, but with a malevolent intention to injure the owner of other lands, they would be amenable to punishment by criminal information or indictment for an abuse of the powers vested in them. But if they act *bona fide*, doing no more than they honestly think necessary for the protection of the

5. (1877) 2 App Cas 839, 846. 6. (1874) L R 10 Ex 4.
7. 8 B & C 355.

level (*i. e.*, the land they superintend) their acts are justifiable, and those who sustain damage therefrom must protect themselves."

The last English case necessary to refer to on this subject is that of *Whalley* v. *The Lancashire and Yorkshire Railway Company* (8). It is somewhat peculiar in its features. The defendants were proprietors of a railway which ran along from east to west over a flat country on a low embankment. A ditch ran along on each side of this embankment for the purpose of draining the railway. The surrounding land sloped from south-east to north-west, so that the land on the north-west side of the railway embankment, where the damage occurred, was at a lower level than on the south-east side of the embankment. The plaintiff was a farmer occupying lands on the north-west side, the lower side of the railway, but separated from it by other lands belonging to other persons. By reason of an unprecedented rainfall a quantity of water which accumulated on the south-eastern side of the embankment, was dammed up against it, and ultimately rose to such a height as to expose the embankment to danger. This water, it was apparently considered, might possibly have percolated through the embankment, and in no sense did the Company, as did the defendant in *Rylands* v. *Fletcher* (9) bring the water upon or up to the Company's lands, but when the water had risen to such a height that the defendants thought it was necessary for the protection of their embankment, they caused trenches to be cut in the embankment, through which the water was enabled to escape to the north-west side of the railway and from thence to flow into the adjoining lands and ultimately to the plaintiff's land, damaging his crops. The case was tried before Mr. Justice Day and a jury. The jury found that the cutting of the trenches through which the water flowed was reasonably necessary for the protection of the defendants' property, that it was not done negligently, and that the plaintiff was injured by the water that so came through the trenches to the extent of £138 beyond what it would have been if the trenches had not been cut. On these findings the learned Judge gave judgment for the plaintiff for £130. Brett, M. R., deals in his judgment with the facts of the case and the principles applicable to it. At page 137 he said :—

"But then it is suggested that if a person has brought the danger on his land, it makes a difference. So it does. If he has not brought the danger there, and without any act of his it breaks through his land on to his neighbour's land, I take it he is not liable. In that case both have suffered from a common

8. (1884) 13 Q B D 131. 9. L R 3 H L 330.

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extraordinary danger, but one has suffered before the other ; that is all. . . . In this case the water endangered the embankment and, moreover, it would have gone on to the plaintiff's land in any event ; but then if it had been left alone and allowed simply to percolate through the embankment, even though all of it would have gone on the plaintiffs' land, it would have gone without doing the injury which was done by reason of its pushing through the cuttings which the defendants made. The defendants did something for the preservation of their own property which transferred the misfortune from their land to that of the plaintiff, and therefore it seems to me that they are liable."

Lord Justice Lindley, at page 140 of the report, says:—

"It appears to me that this case is more analogous to the Scotch case of *Menzies* v. *Earl of Breadalbane* and *Nield* v. *L. N. W. R. Company*

"It seems to me established by those cases that if an extraordinary flood is seen to be coming upon land the owner of such land may fence off and protect his land from it, and so turn it away without being responsible for the consequences, although his neighbours may be injured by it."

"*Rex* v. *Pagham* Commissioners is another step in the same direction. .. .. We must look at the broad question, which is whether a landowner on whose land there is a sudden accumulation of water, brought there without any fault or act of his, is at liberty actively to let it off on the land of his neighbour without making that neighbour any compensation for damages, because the landowner by doing so has been able to save his own property from injury ? I can see no authority for that, and it appears to me the general rights and duties of landowners are decidedly against it."

Some point was made in this case to the effect that the stream alleged to have been stopped up was at best merely an artificial watercourse and not a natural one. In the latter case the successive riparian owners have been each entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land as a natural incident of the ownership of his land. In the former case, however, any right of the owner to the flow of the water must rest on prescription or grant from or contract with the owner of the land from which the water is artificially brought. [*Rameshur Pershad Narain Singh* v. *Koonji Behari Pattuk* (10) ; *Kensit* v. *Great Eastern Railway Company* (11)]

There is, however, a well-established principle of law directly bearing upon this case and vitally affecting it, namely, that a watercourse originally artificial may have been made under such circumstances, and have been used in such a way that an owner of land situate on its bank will have all the rights over it that a riparian owner would have if it had been a natural stream. [*Sutcliffe* v. *Booth* (12) ; *Holker* v. *Poritt* (13) ; *Bailey and Co.* v. *Clark, Son and Morland* (14)].

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10. (1878) 4 App Cas 121. 11. (1884) 27 Ch D 122, 134.
12. 32 L J Q B 136. 13. (1873) L R 8 Ex 107.
14. (1902) 1 Ch 649, 664, 669, 673.

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It is not necessary in order to apply the principles of these decisions to analyse the evidence in detail. It was proved by a Public Officer, the Superintendent of Land Records, and not contradicted, that this so-called canal went right up to the boundary of the appellants' land; while on the following five paragraphs of the written statement of the respondents they practically admitted the facts founding the charge against them, though at the same time they misrepresent the conduct and action of the appellants. These paragraphs run thus :—

6. The said channel became wider and longer through erosion, with the result that the salt water from Kyonkan Chaung overflowed on the lands of this defendant and of adjoining cultivators and caused damage thereto.

7. In order to prevent such damage in or before the year 1914 the first defendant admits there was a bund erected across the said channel at a point where it flows through the land of this defendant and others. Such erection was said to be by the permission of Maung Thi Hla, the then Township Officer of Bogale.

8. The said bund gave way in or about the year 1916-17, and this defendant with his assistants repaired the bund formerly erected at the same place where the original bund was erected without any objection on the part of the plaintiffs or any one else.

9. On the 1st July, 1917, the first plaintiff and others illegally trespassed on the first defendant's lands originally acquired and lands purchased afterwards and opened the said bund, but the bund was erected again as there was no legal order and report that effect was made to Thugyi Maung Shwe Loon.

10. On or about the 25th August, 1917, in pursuance of an order of the Deputy Commissioner of Pyapon, the said bund was opened, and after such date it has not been closed.

The evidence and findings of the Judges upon these statements establish, as will presently be shown, that the defendants themselves erected the bund referred to in the second as well as in the third of these paragraphs. To effect this work they must have gone in upon the alveus of the canal, closed up with this bund, the eye of the bridge what was the outfall of the canal into the sea, and thus have offended against the law as laid down in the English cases. The District Judge framed for himself certain issues and answered them thus : To the second issue he gave the answer that the canal was not a Government constructed work, but was for a long time before 1906-1907 a naturally formed channel. The third issue so framed ran, "Did this canal facilitate the free outflow of rain water from the plaintiffs' (appellants') paddy lands ?" His answer ran thus : "There cannot be any doubt that as all the parties

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admitted the canal takes the water into the Kwin from the Kyonkan Creek at flood tide, and takes the water out from the Kwin into the creek at ebb tide, therefore a certain extent of rain water must find its way into the Kyonkan Creek as a natural consequence." And, again, "there cannot be any doubt as to the motive of the defendants that they erected the bund and closed the canal to protect their own fields from salt water ; but there cannot also be any doubt that the stoppage of the outflow at ebb tide caused the excess water to remain in the fields of both the parties." He answers the fifth issue in the following words : the "weight of evidence is clearly in favour of the plaintiffs," and I would [thus] answer the fifth issue.

He further finds that Map 2A makes it clear that the channel had been in existence before the year 1906-1907, and that there was no canal construction by any one. He ultimately gave a decree in favour of the appellants for Rs. 8.821-48. No case has been made that these damages were excessive in amount if the legal wrong complained of had been actually committed. There was ample evidence in the case to sustain the findings of the District Judge if he believed the witnesses who gave it, as apparently he did, having seen and heard them. It appears to their Lordships plain that the access of some salt water from the creek through the eye of the bridge into the canal twice in the twenty-four hours in flood tide does not resemble in any way those incursions of the sea dealt with in *The King* v. *The Commissioners of Sewers for Pagham* (7) and still less did the closing up of the eye of the bridge, by this bund, and in seasons of heavy rain the ponding up of the fresh water in the canal, so that lands higher up that stream were flooded resemble those necessary precautions which a landowner whose land is at the mercy of these incursions of the sea is entitled to take to protect his property. If the stopping up of the outfall of the canal was justifiable by reason of this access of some salt water at flood then every freshwater tributary to a tidal river could be closed up at its mouth to prevent the like consequences.

Both the cases [*Abdul Hakim* v. *Ganesh Dutt* (1) and *Ramaswami Naicker* v. *Rasi Naicker* (2)] referred to in the third reason for the appellants' appeal deal with surface water, the rain which falls on agricultural land not with water-

1. (1885) I L R 12 C 323. 2. (1913) I L R 38 M 149 : 25 M L J 276.
7. 8 B & C 355.

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courses of any kind. They are irrelevant therefore to the questions in controversy in this case, and are not in conflict it appears to their Lordships with any of the English cases cited.

The respondents appealed, and on the appeal the learned Judges of the Chief Court of Appeal seem to have taken a course as unwise as it was extraordinary. The appellants had undoubtedly in paragraph 4 of their plaint stated that the Government had in the year 1913 dug this canal, shown by letters A, B, C, D, on Ex. A. That was no doubt found to be untrue, but no evidence whatever was given to show that the Government had any jurisdiction or authority to do such a thing, and what is much more important that if they had such authority an action could not be brought for any injurious consequence resulting to individuals from its execution.

That paragraph of the plaint is followed by two others, Nos. 5 and 9.

5. The said canal thus facilitated the free outflow of the rain water from the plaintiff's paddy lands aforesaid into the said Kyonkan Chaung and rendered cultivable all the lands situate in Kamaung Ngotto West Kwin and Sakangyi South (A) and (B) Kwins, which adjoin the said Kamakalu Kwin.

9. The plaintiffs have been informed and verily believe that during the month of Kason or Nayon, 1279 B. E., the first defendant's tenants and servants by order of the first defendant and the defendants Nos. 2 to 8, closed the said canal at the point B shown in red ink in the plan Ex. A.

The alleged wrong for which the plaintiffs claim damages was the stopping up by a bund of the outfall of the canal, by which means the water of the canal, having been denied escape at the proper place, was ponded up, flowed back, and flooded their lands. The identity of the body or person which or who actually formed the canal was a matter wholly irrelevant to the matters in issue. It did not form even an ingredient in the cause of action, and there is not an averment in the plaint to show that the plaintiffs did not rely upon the canal being an old natural watercourse enlarged, but new or artificial. The plaint is entirely consistent with their relying upon the one thing or the other, as suited them best.

Yet, strange to say, one of the learned Judges in the Chief Court (Mr. Justice Duckworth) considered that this statement as to the digging of the canal by the Government was a matter of such vital importance, that the judgment of the District Judge should be reversed, and his decision in the plaintiffs' favour be overruled because this allegation had not been proved.

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In justice to Mr. Justice Duckworth, the following passages from his judgment should be quoted :—

"I have only to add a few remarks. It appears to me that the plaintiff-respondent Maung Bya set up a certain case in his pleadings, by which he must either stand or fall. It is clear, from his plaint, that his case was that, until Government made a canal, the lands which belong to him were unworkable, but that, after Government made a canal connecting the Fishery creeks with the Kyonkan Chaung, his fields became culturable. Further, he contended that owing to the appellant Maung Tet closing this canal, at the Kyonkan Chaung end, by a bund, in 1917 he suffered certain damage through his fields becoming inundated."

It does not appear to their Lordships that this is at all an accurate or fair construction of the plaint of the appellants.

The learned Judge then proceeds :—

"In fact, treating this channel, as I think we must, as a natural water-course [see *Kaw La* v. *Maung Ke* (15)], we find that appellant is a riparian proprietor, whereas the respondent is not.

"This is the only view of the case which can be inferred from the evidence."

This would go to show that the map of 1906 was right, and that what was done in 1913 was to clean up flooded areas and deepen a natural watercourse, and not to create a new one, involving the forfeiture of the riparian owners' rights.

The last paragraph, the different portions of which seem scarcely consistent with each other, runs thus :—

"It is quite unnecessary to consider any other points. The respondent set up a case, which he failed to prove, and obtained a decree before the District Court on a case which he had not pleaded. It is settled law that a plaintiff must not be permitted to succeed on a case which he has not put forward directly or indirectly in his plaint. Further, it is apparent that the learned Judge of the District Court took a mistaken view of the facts, his chief error being his overlooking the fact that respondents' lands drew no advantage whatever from this channel until it had opened a way through the road bund into the Kyonkan Chaung, and that only some four years prior to any cause of action having arisen.

"I concur with my learned brother in allowing the appeal with costs, and in the decree passed by him, including special costs to Messrs. Leach and Lentaigne Junior."

The passage appears to suggest that a defendant who diverts or stops the flow of a natural watercourse and thereby floods the lands of a riparian owner is not to be held responsible in damages for the wrong unless he, the defendant, has made a profit by it. In their Lordships' opinion such a doctrine is unsound.

The other learned Judge, Mr. Justice Maung Kin, deals with this point somewhat differently. He says :—

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15. 8 L B R 556.

"The finding that the canal was not one made by the Government is not contested before us. It is, however, contended that plaintiff had the right to the undisturbed flow of water from his land through the canal into the Kyonkan Chaung on the ground that the canal is a natural waterway.

"It is doubtful whether the learned District Judge was right in giving a decree upon a case not set up by plaintiff in his plaint. The basis of the suit as described in the plaint is that the canal was dug by the Government for the benefit of the cultivators, and that it, in fact, benefited them because it drained the surplus rain water from plaintiff's land."

This, as has been already pointed out, is not a true construction of the appellants' case and contention.

The learned Judge then proceeds to add :—

"I may add that there is no equity in favour of plaintiff. He had not derived any benefit before the depression became sufficiently wide and deep to allow of its carrying water coming from the direction of his land, and when the bund was built by Government, there was no reason for thinking that that water would flow in the direction of the bund. But the defendants have all along enjoyed the benefit of the existence of the bund, because it has prevented blackish water coming to defendants' lands from the Kyonkan Chaung. I do not see any justice in allowing plaintiff's claim to remove the bund for the benefit of his land, unless he has a natural or prescriptive right to make it. I have held that he has no natural right, and sufficient time has not elapsed for a prescriptive right to ripen.

"For the above reasons I would allow the appeals Nos. 183 and 188 of 1919, with costs."

It appears to their Lordships difficult to understand what the learned Judge meant by the first of these paragraphs.

Their Lordships are quite unable to concur with the learned Judges of the Chief Court in the views they have taken of the rights and liabilities of the parties litigant in this case. They think these views are conflicting *inter se,* unsound and misleading. To gather together the points fully dealt with above it may be said that in their Lordships' view it is clearly established (1) that a raised road or bund ran transversely across the depressed ground through which flowed the channel of water, and was properly provided with a gap for the flow and a bridge over the channel, (2) that the bund thus provided with an eye and a bridge to permit the inflow and outflow of water was interfered with by the respondent, who filled up the eye and channel course thereat, and converted an innocuous bund into a dam, which dammed back the water on to the appellant's land, and that in law (3) the respondents are responsible for the damage thus caused to the appellant's property. They think the judgment appealed from was erroneous and ought to be set aside, that the decision of the District Judge was right and should be restored, and will humbly advise His

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Majesty accordingly. The respondents must pay the costs of the appellants in the hearing of the Chief Court and of this appeal.

Solicitors for appellants : *Light and Fulton.*

Solicitors for respondents : *H. Hilberry and Son.*

A. de M. *Appeal set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice,* AND MR. JUSTICE SRINIVASA AIYANGAR.

Vaddadi Kamaraju ... *Appellant** (*Plaintiff*)

v.

Kocherlakota Venkatalakshmipathi and others ... *Respondents* (*Defendants*)

Kamaraju v. Venkatalakshmipathi.

Hindu Law—Reversioner—Reversionary right—Transfer of—Contract to transfer—Relinquishment by way of compromise—Validity—Transfer of Property Act, S. 6—Admission by reversioner for good consideration that properties in dispute never formed part of the estate of the last male owner—Validity—Distinction between two transactions—Test.

A reversioner in expectancy cannot validly transfer his *spes successionis.* Not only are transfers of expectancies forbidden, but contracts to transfer them when the reversioner enters into possession are also forbidden.

The relinquishment of a reversionary right cannot be the consideration for a compromise. But, while a man cannot relinquish his reversionary right in given properties, he can relinquish his right to say that the properties in dispute form part of the estate to which he is the reversioner; he may, for good consideration, admit that the properties never formed part of the estate of the person from whom he claims and therefore he is not relinquishing his reversionary right to that estate but is merely admitting that the properties with which the dispute is concerned were not properties which formed part of the estate to which he was a reversioner. In order to ascertain on which side of the line a particular case falls one has to note the circumstances and what the words or the agreement in question are.

Appeal from the decree of the Court of the Additional Subordinate Judge of Cocanada in O. S. No. 2 of 1921.

S. Varadachariar and *C. Rama Rao* for appellant.

A. Krishnaswami Aiyar for respondents.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS :—*The Chief Justice* :—By S. 6 of the Transfer of Property Act it is enacted that the chance of an heir-apparent succeeding to an estate or other mere possibility of a like nature cannot be transferred. It is, therefore, clear that a reversioner in expectancy cannot validly transfer his *spes successionis* ; and that doctrine has been carried by this

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*Appeal No. 72 of 1922. 25th November, 1924.

Court a step further in the case reported in *Jagannadha Raju* v. *Prasada Rao* (1) that not only are transfers of expectancies forbidden but that contracts to transfer them when the reversioner enters into possession are also forbidden on the ground that, were it not so held, the provisions of the Act would be rendered entirely nugatory and futile. That reasoning of this Court has been accepted by the Privy Council in the case of *Annada Mohan Roy* v. *Gour Mohan Mullick* (2). In the present case the plaintiff brought a suit in order to assert his position as reversioner to the estate of one Subbaraju. He impleaded the widow and various other persons who alleged themselves to be alienees from her; and he was confronted with this that in the year 1904 he brought a declaratory suit to have his position as reversioner to Subbaraju's estate declared and that suit had been settled by a compromise and a judgment based on it, the brief effect of which was that the plaintiff withdrew his claim provided that he was given as he was given certain lands which were in dispute between the parties. I intend to guard myself from deciding this case on any wider ground than is absolutely necessary to this decision. After the very learned and instructive arguments I have heard of I think one may fairly say that the effect of the decisions of the Privy Council referred to, viz., *Amrit Narayan Singh* v. *Gaya Singh* (3), *Kanhai Lal* v. *Brij Lal* (4) and *Annada Mohan Roy* v. *Gour Mohan Mullick* (2), to which I have already referred to, is to draw a line of demarcation between the cases and show clearly the principle in the light of which one is to decide, that is to say, on which side of the line a case with a given set of facts is to be decided. The distinction, I mean, can be stated in this way correctly enough for the purpose of this case: that the relinquishment of a reversionary right cannot be the consideration for a compromise. But, while a man cannot relinquish his reversionary right in given properties, he can relinquish his right to say that the properties in dispute form part of the estate to which he is the reversioner; he may for good consideration admit that the properties never formed part of the estate of the person from whom he claims and therefore he is not relinquishing his reversionary right to that estate but is merely admitting that the properties with which

1. (1915) I L R 39 M 554 : 28 M L J 650.
2. L R (1923) 50 I A 239 : 45 M L J 617 (P C).
3. L R (1917) 45 I A 35 : 34 M L J 298 (P C).
4. (1918) I L R 40 A 487 : 35 M L J 459 (P C).

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the dispute is concerned were not properties which formed part of the estate to which he was a reversioner. In order to ascertain on which side of the line this case falls one has to note the circumstances and what the words of the agreement are. I need not read the plaint—nothing turns on it—but the defence in the suit of 1904 is material. Paragraph 5 of the written statement alleged that the properties in question in both these suits formed the self-acquisition of the 1st defendant and she was entitled to alienate it at her pleasure. Then with regard to the rest of the property paragraph 10 says this :—

"At the time of his death the 1st defendant's husband gave the remaining half also of the said house-site to the 2nd defendant for purposes of dwelling with absolute rights. Since then the 2nd defendant has been living there with family. Later on the 2nd defendant's husband built thereon a tiled house which at the time of the marriage of the 2nd defendant's daughter was given away as a *katnam* (present) to the 3rd defendant."

That was the issue that the parties desired to dispose of in that suit ; and then somebody intervened and brought them together and a compromise was filed in the suit and the agreement was as follows :—

"In respect of the 4 acres of land together with the various fruit trees thereon the defendants shall in 30 days time from this date execute a registered deed, with the usual recitals in favour of the plaintiff in view to the enjoyment thereof by plaintiff with absolute rights and that thereupon the plaintiff shall withdraw this suit."

That is what he got and it is to be noted that he got not merely an admission that the property was considered to belong to him but a conveyance to him from the defendants as the defendants were but for this agreement the owners of this property. It goes on to say—

"That in case the whole of the remaining suit property is enjoyed by the defendants with full rights according to their previous enjoyment, no dispute of any kind will be ever raised by the plaintiff."

Then, that is carried out. The compromise was dated the 9th February, 1905, and it was recorded on the 20th March. Meanwhile the parties had executed another document—it is Ex. V in the case—and that is what is described as a release of rights executed on the 8th March, 1905, to the plaintiff. I quite concede that the language of this document in places affords considerable scope for an argument of the type that has been addressed to us—that on its true construction it amounts to nothing more than a withdrawal of the plaintiff's reversionary rights. For instance " As in accordance with the terms thereof I waived my reversionary right to the scheduled

property and by way of consideration therefor the said Pulugartha Mahalakshmamma Garu gave me by document executed this day property worth Rs. 1,000 described hereinbelow out of what was conveyed to her by the gift deed I have hereby relinquished the reversionary right possessed by me after the death of the said Mahalakshmamma Garu."

On the whole I think that the true construction of this document is not that contended for by the appellant. It seems to me that what he really did was to acknowledge the claim of the defendants that this property in dispute formed no part of the estate to which he claimed to be—and perhaps was—the reversioner. If that be so—and it appears to me looking at all the documents, to be the most reasonable construction, having regard to the terms of them, all looked at together—then no question arises because nobody could possibly contend that if that was the real effect of the transaction, an agreement come to by this man on the basis of such a state of facts would not be a complete estoppel. I therefore do not propose to consider other grounds on which the same result might be arrived at and which have been argued before us, because I think it is enough to dispose of the appeal. I am of opinion that this appeal must be dismissed with costs.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—I agree in the judgment just pronounced by my Lord. I only wish to add a few words. In all such cases when the question arises whether the transaction was really a relinquishment of a *spes successionis* or a *bona fide* compromise of disputed rights, it seems to me that the best thing to do would be to look at the substance of the transaction apart altogether from any form which might have been given to it. If in substance the transaction is found to be only a dealing with the *spes successionis*, then of course it cannot be recognised and cannot form the basis of any binding obligation. But if, on the other hand, the substance of the transaction is found to be a *bona fide* settlement between the parties, then in spite of the fact that the same transaction might be represented in one of its aspects as a dealing with a *spes successionis*, it is none the less a real compromise of disputed rights. In the present case there seems to be really no doubt whatever, having regard to all the circumstances and all the documents, that what the parties did was to recognise the right set up on behalf of the widow to part of the property on the ground that it was her absolute property and hence no part of the property inherited by her from her husband at all and

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as to the rest of the property to recognise the right claimed by the daughter as under a gift from her father. It is not possible to represent this transaction as in substance being a relinquishment by a reversioner of a mere expectancy. I therefore agree that the appeal should be dismissed with costs.

A. S. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE JACKSON.

G. K. Chengravelu Chetti & Sons... *Defendants** (*Petrs.*)

v.

Akarapu Venkanna & Sons ... *Plaintiffs* (*Respts.*).

Chengravelu Chetti & Sons v. Venkanna & Sons.

Contract Act, S. 51—Sale of goods—Contract—Construction—Concurrent conditions—Suit for damages—What plaintiff should prove.

A contract for the sale of goods provided as follows :—"The buyer agrees to purchase goods at the undermentioned terms and price and accepts the seller's godown delivery and pay cash for the same........Delivery from 1st October before 31st October, 1921." On the last day fixed for performance the buyer called on the seller to give delivery without at the same time tendering the price. The seller, who had no goods in his possession, falsely replied that he had been unable to send the goods on account of rain and asked the buyer to pay the price within 24 hours and take delivery of the goods. Thereupon the buyer sued the seller for damages for breach of contract. *Held,* on a construction of the contract, the parties agreed that the performance of their respective promises was to be simultaneous, *i. e.,* each was to be ready and willing to perform his promise at one and the same time. The buyer in such a case must allege and prove that he was ready and willing to pay for the goods, and having himself committed default, could not take advantage of a default on the part of the seller.

Case stated under S. 69 of the Presidency Small Cause Courts Act, 1882, in Full Bench Application No. 178 of 1922, in Suit No. 13222 of 1921 on the file of the Court of Small Causes, Madras.

S. Rangaswami Aiyangar for petitioners.

K. Bhashyam Aiyangar for respondents.

The Court delivered the following

JUDGMENT :—Certain questions have been submitted for our opinion under the provisions of the Presidency Small Cause Courts. The facts which led to the reference may be briefly stated. The plaintiffs entered into a contract with the defendants on the 7th of September, 1921. It related to ten bales of yarn which the defendants agreed to sell to plaintiffs. The material portion of the contract may be reproduced :—

"The buyer agrees to purchase the undermentioned goods at the undermentioned terms and price and accepts the seller's godown delivery and pay

*R C No. 13 of 1923. 29th August, 1924.

cash for the same. Particulars for the account: Ten bales for 400 bundles at Rs. 19-12-0 per bundle. Delivery from 1st October before 31st October, 1921."

The first question to be decided by us is, what is the true construction of this contract? Are the promises in the nature of concurrent conditions—the promise relating to the payment of the price and the promise relating to the delivery of the goods? Or, is the payment of the price by the plaintiffs conditional on the performance by the defendants of their part of the contract, namely, delivery of the goods? We entertain no doubt that on a true construction of this contract, the parties have agreed that the performance of their respective promises is to be simultaneous, that is to say, that each shall be ready and willing to perform his promise at one and the same time. Anson says:—

"Modern decisions incline against the construction of promises as independent of one another...........In a contract for the sale of goods, the rule of Common Law, now embodied in the Sale of Goods Act, was that 'unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions'."—Anson on *Contracts*, 16th Edition, 1923, page 359.

"Where each party is to do an act at the same time as the other, as where goods in the sale for cash are to be delivered by the vendor and the price to be paid by the buyer, these are concurrent conditions and neither party can maintain an action for breach of contract without averring that he performed or offered to perform what he himself was bound to do."—Benjamin on *Sales*, 6th Edition, pages 638 to 639.

S. 51 of the Indian Contract Act enacts the law on the point in similar terms.

Let us now see what has happened in this case. The plaintiffs, on the 31st of October, 1921, that is, the last day fixed for the performance of the contract, sent a letter to the defendants calling upon them to give delivery of the goods in question. The learned Trial Judge has found that the plaintiffs' version that they sent the price of the goods along with the letter is untrue. The defendants on the same date wrote back to say that they were unable to send the goods owing to rain and added:

"Within 24 hours after seeing this letter you should pay money for the aforesaid ten bales and take delivery of the same."

The Trial Judge on this part of the case finds that the defendants gave a false excuse, namely, that of rain, and that in fact they did not have goods in their godowns. He is also of opinion that the plaintiffs are wealthy merchants and that, therefore, they could have easily paid the price. On these findings he allowed the plaintiffs' claim and awarded damages. When the case was taken before the

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Full Bench of the Court of Small Causes, it was heard by all the three Judges of that Court including the Trial Judge. The other two Judges were of the opinion that the plaintiffs could not recover damages on the facts proved. We are clearly of the opinion that the view of the majority of the Judges is correct. It will be seen that the defendants did not repudiate the contract and *Shriram Rupram* v. *Madangopal Gowardhan* (1) relied upon by defence has, therefore, no application. The mere fact that the defendants did not have the goods in their possession does not show that they were either unable or unwilling to perform the contract. If the price had been paid, it is not impossible that the defendants would have procured the goods and given delivery. Was it the duty of the defendants to satisfy the plaintiffs that they had the goods with them before the price was tendered? Anson states the law thus at page 354 :—

> "If *A* and *X* agree that the performance of their respective promises shall be simultaneous, the conditions are concurrent. Thus in a sale of goods where no time is fixed for payment, the buyer must be ready to pay and the seller ready to deliver at one and the same time."

The learned author quotes the case of *Morton* v. *Lamb* (2) :

> "Morton agreed to buy a certain quantity of corn from Lamb at a fixed price, the corn to be delivered in one month. It was not delivered and Morton sued for damages, alleging that he had been always ready and willing to receive the corn. But the Court held that this was not enough to make a cause of action. He should have alleged that he was always ready and willing to pay for the corn; he might, for aught that appeared on the pleadings, have discharged the defendant by his non-readiness to pay."

Thus, where the contract relates to sale of goods, the plaintiff if he happens to be a buyer must allege and prove that he was ready and willing to pay for the goods and likewise if the seller be the plaintiff, he must allege and prove that he was ready and willing to deliver the goods. The plaintiffs in this case having themselves committed default, cannot take advantage of what is said to be a default on the part of the defendants. The action on the findings of the learned Judge is thus bound to fail.

So far, the case does not present much difficulty. The suit was filed on the footing of a breach of contract and the allegation in the plaint was that the plaintiffs performed their part and that the defendants committed default. The learned Judge, however, on the evidence before him, came to the conclusion that the parties did not intend either to deliver the

1. (1903) I L R 30 C 865 (P C). 2. (1797) 7 T R 125 : 4 R R 395.

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goods or pay the price but their object was only to settle their rights by payment of differences. The learned Judge seemed to think that the defendants, finding that the market was rising, were unwilling to keep to their bargain and that, therefore, they should be mulcted in damages. This is how the learned Judge explains his own judgment :—

"It (my judgment) is rightly or wrongly based on the finding that the contract is a speculative one, the most common characteristic of which is that the parties waive the ordinary steps of paying or tendering the price and tendering or delivering the goods, but settle their rights by payment of the differences."

This is not the case set out in the plaint, and the defendants were not called upon to meet it. If the plaintiffs had applied for permission to amend the plaint, the application would probably be disposed of with reference to O. 7, R. 14 of the Small Cause Courts Rules analogous to O. 6, R. 17 of the Civil Procedure Code. No such application was made and indeed it is unnecessary to pursue the matter further, for the finding in effect is that the transaction is a wagering contract and even then the plaintiffs are bound to fail and the suit must be dismissed. No hard and fast rule can be laid down as to when a plaint should be allowed to be amended or when it should not be. But we do not propose to answer that question as in the circumstances it does not arise.

We have not attempted to answer seriatim the questions submitted to us. The Trial Judge has added a note to say that one of the questions submitted to us does not arise. Our observations are sufficiently indicative of our opinion, and the case will go back to the Small Cause Court for being disposed of according to law.

T. S. V. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Dharmala Kamayya ... *Appellant** (*Plaintiff*)

v.

Bhimarasettei Paridesi and another ... *Respondents* (*Defendants*).

Kamayya v. Bhimarasettei Paridesi.

Civil Procedure Code, O. 21, Rr. 35, 36—Decree-holder—Right to get actual possession—Symbolical delivery—Effect of—Limitation Act, Arts. 137 and 138.

Where a decree-holder is entitled to get actual possession, but takes instead of it symbolical delivery, it cannot be said that he has got the possession to which

*S A No. 1165 of 1921. 1st September, 1924.

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he is entitled; and if he does not get actual possession when he is entitled to it, the judgment-debtor in possession of the property cannot be said to be ousted from it, and therefore in a case where the latter's possession continued for more than 12 years before the date of suit, the decree-holder's claim to obtain possession is barred. *Govindaswami Pillai* v. *Pethaperumal Chetti*, 44 I C 839 followed. *Govind* v. *Venkata Sastrulu*, 17 M L J 598 doubted.

Symbolical delivery is given in cases where the decree-holder is not entitled to actual possession at the date when the property is delivered to him in execution either by reason of the property being in the possession of tenants or mortgagees or other persons who are entitled to be in possession as against the judgment-debtor.

Second appeal against the decree of the District Court, Vizagapatam, in A. S. No. 290 of 1918, preferred against that of the Court of the Additional District Munsif of Vizagapatam in O. S. No. 214 of 1917.

B. Jagannatha Doss for appellant.

B. Satyanarayana for respondents.

The Court delivered the following

JUDGMENT :—The point raised in this second appeal is that defendants Nos. 2 and 3 do not claim the property adversely to the 1st defendant and that a decree having been executed against the 1st defendant, defendants Nos. 2 and 3 are not entitled to set up their own right in opposition to the plaintiff's claim. The District Munsif found that there was symbolic delivery of the property to the plaintiff. The District Judge accepted that finding and held that symbolic delivery could not bind defendants Nos. 2 and 3 and as they have been in possession all these years, the plaintiff's suit is barred by limitation. It is difficult to follow the reasoning of the learned Judge. Third defendant is the widow of the 1st defendant and the 2nd defendant is his son. Third defendant could not have had possession of her own during her husband's lifetime. First defendant in the previous suit contended that it was ancestral property and that he was in possession. So 3rd defendant could not have had possession independent of the 1st defendant. Second defendant was a minor at the time of the alleged delivery of possession and he could not have had any possession independently of his father who was the managing member of the family. In these circumstances, defendants Nos. 2 and 3 could not have had any possession independently of the 1st defendant and they are bound by the proceedings in execution. The District Judge's decision on this matter is not according to law. But the judgment of the learned

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Judge can be supported on other grounds. It is argued for the respondents that the delivery was, as the District Munsif puts it, symbolic delivery. The suit was against the 1st defendant and 2nd defendant by the plaintiff for possession under the old Civil Procedure Code. The plaintiff was entitled to actual possession under S. 263, corresponding to O. 21, R. 35, of the present Code. The finding is that he got what the Munsif calls symbolic possession. The 1st defendant was in actual possession at the time. The question is whether this symbolic delivery is according to law, and whether it gives the plaintiff a cause of action against the 1st defendant. In a recent case reported as *Govindaswami Pillai* v. *Pethaperumal Chetti* (1) the learned Judge observed : "We must point out that symbolic possession is given only in cases where the party in actual possession is entitled to remain in such possession as in cases of delivery under O. 21, R. 96, of the Civil Procedure Code, and should not be confounded with cases where a party is entitled to actual possession, but obtains only what is called a paper delivery (that is) where he gets no possession at all." When a plaintiff is entitled to actual possession under the law, he is not entitled to get what is called symbolical possession. Symbolical possession is given in cases where he is not entitled to actual possession at the date when property is delivered to him in execution of a decree either by reason of the property being in the possession of tenants or mortgagees or other persons who are entitled to be in possession as against the judgment-debtor. The right to actual possession of the decree-holder in such a case arises only when he the judgment-debtor would be entitled to possession and Arts. 137 and 138 of Sch. I, Limitation Act, would apply in such cases. But where a judgment-debtor is actually in possession and the decree-holder is entitled to actual possession and cannot get anything less than that, and if he does not get actual possession he cannot rely upon symbolic possession, for the law does not allow a person who is entitled to actual possession to get only symbolic possession. Rules 95 and 96 of O. 21, Civil Procedure Code, apply to auction-purchasers. Rr. 35 and 36 apply to the case of the decree-holder who is entitled to possession. In *Mahadev Sakharam Parkar* v. *Janu Namji Hatle* (2) it was held, that if a person is entitled to actual possession, his taking symbolic possession would be of no avail and the possession

1. (1917) 44 I C 839 at 840. 2. (1912) I L R 36 B 373.

of the judgment-debtor would continue and if the decree-holder does not get actual possession within the time allowed by law, his right would be barred. In *Jang Bahadur Singh* v. *Hanwant Singh* (3) the case of *Mahadev Sakharam Parkar* v. *Janu Namji Hatle* (2) was followed and to my mind the reasoning of the learned Judge seems very satisfactory. The Calcutta High Court has taken a different view but in most of the cases symbolic delivery was given to decree-holders who were not entitled to actual possession at the time the property was delivered to them. In *Govind* v. *Venkata Sastrulu* (4) the learned Judges, following the Calcutta decisions, held "that the delivery of symbolic possession, even if erroneous, operates to give the person put in possession a fresh cause of action and places the judgment-debtor in the position of a trespasser." With great respect to the learned Judges, I think, where the decree-holder is entitled to actual possession and he does not get it, it cannot be said that he has got the possession to which he is entitled ; and if he does not get actual possession when he is entitled to it, the person in possession of the property cannot be said to be ousted from possession. A later decision of three Judges of this Court, to which I have already referred, and which is reported as *Govindaswami Pillai* v. *Pethaperumal Chetty* (1) is binding upon me. It is unnecessary for me to consider the other cases cited by Mr. Jagannatha Das for the appellant. I hold, that the plaintiff's possession was no possession at all, defendants' possession continued right through and that possession having been for more than 12 years before the date of the suit, the plaintiff's claim is barred. The second appeal fails and is dismissed with costs.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE KRISHNAN.

N. M. R. Nagappa Chetty and others ... *Appellants** (*Dfts.*)

v.

V. A. A. R. Firm ... *Respondents* (*Plaintiffs.*)

Stamp Act, S. 36 and Sch. I, Art. 1—Acknowledgment—Letter stating correctness of account sent—If requires stamp—Letter admitted in evidence—Objection in appeal.

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*O S Appeal No. 17 of 1925. 5th March, 1925

1. (1917) 44 I C 839 at 840.
2. (1912) I L R 36 B 373.
3. (1921) I L R 43 A 520 (F B).
4. (1907) 17 M L J 598.

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In reply to a letter sending a statement of account, a letter was sent stating that the account sent was correct. *Held,* it was not an acknowledgment which in the words of Sch. I, Art. 1 of the Stamp Act was obtained in order to supply evidence of the debt and as such did not require to be stamped.

Where a document which is required to be stamped is admitted in evidence by the Trial Court even though unstamped, S. 36 bars an objection being raised in appeal that the document was not duly stamped.

On appeal from the judgment and decree of the Hon'ble Mr. Justice Coutts Trotter, dated 20th day of December, 1922, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 911 of 1921.

S. Jagadisa Aiyar and *V. Rajagopala Aiyar* for appellants.

C. Narayanaswami Mudaliar and *S. Subramania Aiyar* for respondents.

The Court delivered the following

Kumaraswami Sastri, J.

JUDGMENTS :—*Kumaraswami Sastri, J.*—This is a suit filed by the plaintiffs for the recovery of Rs. 17,919-11-1 with costs and interest due in respect of dealings between the plaintiffs' firm and the 1st defendant. The 2nd and 3rd defendants are the sons of the 1st defendant and they are members of a joint undivided Nattukottai trading family.

The only point now taken in appeal is whether Ex. E is an acknowledgment of liability which requires to be stamped and therefore ought not to have been admitted in evidence. There is no other defence to the plaintiffs' action. The learned Chief Justice who tried the case overruled the plea that Ex. E requires a stamp and admitted it in evidence. We think that we cannot in appeal go into the question whether it was rightly or wrongly admitted. S. 36 of the Stamp Act is clear. It says that, where an instrument has been admitted in evidence such admission shall not, except as provided by S. 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument was not duly stamped. S. 61 does not touch this case where a document has been admitted by the trial Judge in evidence, we do not think that it is open in appeal which is merely a continuation of the same proceeding to question that admission. I need only refer to *Sitaram* v. *Ram Prosad Ram* (1) and *Ahmad Raza* v. *Abid Hussain* (2). As regards any penalty to be recovered the law provides the proper procedure. It is open to the Appellate Court to send the document on for the proper collection of penalty. I do not think the letter is one falling within the definition of an acknowledgment. It is written in reply to a letter sending a

1. (1913) 18 C W N 697. 2. (1916) I L R 38 A 494 (P C).

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statement of account, Ex. F, and states that the account sent is correct. *Galstaun* v. *Hutchison* (3) and *Surjimull Murlidhar Chandick* v. *Ananta Lal Damani* (4) are in point. There are no merits in this appeal. It fails and is dismissed with costs.

Krishnan, J.

Krishnan, J. :—In this case the plea taken in appeal is that the claim is barred by limitation because it is contended the acknowledgment relied on, Ex. E, should not have been admitted in evidence as being unstamped. It is not now denied that, if admitted, Ex. E would be a proper acknowledgment under S. 19 of the Limitation Act to save the bar of limitation. It was originally pleaded by the defendant that it was not such an acknowledgment but that argument has not been urged before us. The sole question argued before us is that Ex. E should not have been admitted as it is not stamped. It was contended that under Art. 1 of the first schedule of the Stamp Act it requires a stamp of one anna and under S. 35 it could not have been admitted even on payment of penalty and the document should have been kept out of the record. Even if we assume for a moment that this argument is correct, such an argument as that could not be addressed to the Appellate Court, the document having been already admitted in evidence by reason of S. 36 of the Stamp Act. That section clearly bars such an attempt in appeal to keep out a document which has already been admitted and acted on by the Trial Court. Apart from that I am inclined to hold that the document does not really require a stamp at all, for it is not an acknowledgment which in the words of Art. 1 was obtained in order to supply evidence of the debt ; for there is plenty of other evidence on the plaintiffs' side—their account-books. This was clearly an ordinary acknowledgment so that the parties might not subsequently dispute the correctness of the amount which had been arrived at as the balance due on the particular date. It was not a document which was required by the plaintiffs for the purpose of proving the existence of the debt itself. That being so, the plea taken cannot succeed. On the merits the defendants have no kind of defence at all. In these circumstances I agree that this appeal fails and must be dismissed with costs.

T. S. V. *Appeal dismissed.*

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3. (1912) I L R 39 C 789. 4. (1923) I L R 46 M 948 : 45 M L J 599.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE VENKATASUBBA RAO.

Chelasani Rattayya ... *Petitioner* (1st respondent in Appeal No.* 186 *of* 1921 *on the file of the High Court—2nd defendant)*

Anne Brahmayya and others ... *Respondents (Appellants and 3rd respondent in do.—Plaintiffs and 4th defendant).*

Civil Procedure Code of 1908, *S.* 110—*Subject-matter of suit—Value of—Valuation given in plaint for purposes of jurisdiction—Effect—Suit under cl.* 17 *of Chapter II of Court-fees Act—Plaintiff's right to object to such valuation—Valuation accepted by defendant—Effect.* Rattayya v. Brahmayya.

The suit was for setting aside an adoption and an alienation. The alienated properties were set forth in the schedule to the plaint and were valued at Rs. 5,000. Admittedly, there were other properties affected by the adoption and by the suit and the value of all the properties was over Rs. 10,000. The plaintiffs finally valued the suit for purposes of jurisdiction at Rs. 10,000.

Held, on an application by the defendant for leave to appeal to His Majesty in Council against the appellate decree in the suit, that, as the suit was for declaration without consequential relief falling under Chapter II, cl. 17 of the Court-fees Act, the value given in the plaint for purposes of jurisdiction must be held to be the market value of the subject-matter of the suit, and that, the defendant having accepted the valuation so given, it was not open to the plaintiff to show that the value of the subject-matter was less than Rs. 10,000.

Petition presented under S. 110 and O. 45, Rr. 2 and 8, Civil Procedure Code, praying that in the circumstances stated therein, the High Court will be pleased to grant a certificate to enable the petitioner to appeal to His Majesty in Council against the decree of the High Court, dated the 13th February, 1924, and passed in Appeal No. 186 of 1921 preferred against the decree of the Court of the Subordinate Judge of Bezwada in O. S. No. 41 of 1919.

B. Somayya for petitioner.

A. Krishnaswami Aiyar and *P. Satyanarayana Rao* for respondents.

The Court delivered the following

JUDGMENT :—This is an application for leave to appeal to His Majesty in Council. The value of the subject-matter of the suit in the Court of First Instance and the value of the subject-matter in dispute on appeal to His Majesty in Council must be Rs. 10,000 or upwards. (S. 110, Civil Procedure

*C M P No. 4216 of 1924. 5th February, 1925.

Rattayya v. Brahmayya.

Code). The suit was for setting aside an adoption and an alienation. The alienated properties were set forth in the schedule to the plaint and were valued at Rs. 5,000 in paragraph 4 of the plaint. That there are other properties affected by the adoption and by the suit is admitted and the value of all the properties was described in paragraph 3 of the plaint as Rs. 10,000 thirty years ago. The plaintiffs finally valued the suit for purposes of jurisdiction at Rs. 10,000 (*see* paragraph 7 of the plaint). This value must be the market value of the subject-matter of the suit. It cannot be the artificial valuation prescribed under S. 7 of the Court-fees Act which is inapplicable to this case as the suit is for declaration without consequential relief and therefore falls under Chapter II, cl. 17 of the Court-fees Act. Under S. 12 of the Civil Courts Act the jurisdiction depends on the value of the subject-matter of the suit and that value (which, in that section, means market value) has been stated to be Rs. 10,000. The plaintiffs are therefore barred by their valuation [see *Alagappa Chetty* v. *Nachiappan* (1)] where the valuation though, under the Court-fees Act, was also of the market value as the suit related to sites and buildings and not lands and therefore was governed by S. 7, cl. (*v*) (*e*) and not cls. (*a*) to (*d*). The decision of the Judicial Committee in *Rachappasubrao* v. *Shiddappa Venkatrao* (2) involves the same principle. It was held in that case that the plaintiff's valuation having been accepted by the defendant, the defendant cannot be allowed to raise the question that the value was less than Rs. 5,000 and to contend that no appeal lay to the High Court. The present case is stronger. It is not the opposite party but the plaintiff himself that wants to show that the value of the subject-matter is less than Rs. 10,000 to avoid appeal to the Privy Council, he himself having valued the subject-matter at Rs. 10,000 when he filed his suit—a valuation accepted by the other side. It is not suggested that, if the value of the subject-matter in suit is Rs. 10,000 or upwards, the value of the subject-matter in appeal has become different.

The judgment is a revising judgment and the petitioner is entitled to the leave prayed for which is accordingly granted.

A. S. V. *Leave granted.*

1. (1922) 43 M L J 728. 2. (1918) I L R 43 B 507 : 36 M L J 437 (P C).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice*, AND MR. JUSTICE SRINIVASA AIYANGAR.

Krishnadoss Vithaldoss ... *Appellant** (*Defendant*.)

v.

Ghanshamdoss and Narayanadoss and others ... *Respondents* (*Plaintiffs*).

Krishnadoss Vithaldoss v. Ghanshamdoss & Narayanadoss.

Letters Patent (Madras)—Cl. 12—Suit for land—Meaning—Trust—Suit for accounts of management of a, and for administration of a—Not a suit for land.

The expression "suit for land" in cl. 12 of the Letters Patent must be construed as an action the primary object of which is to establish claims regarding the title to property or possession of property, and no suit can be described as a "suit for land" as the result of the decision in which the title to, or possession of, immoveable property will not in any manner or measure be directly affected.

A suit merely for the accounts of the management of a trust and for the administration of a trust is not a "suit for land."

Per the Chief Justice:—If the case in 30 M L J 120 is to be regarded as deciding that the amended Civil Procedure Code is to be looked at for the purpose of construing the words of the Letters Patent, the earlier statute, that decision is wrong.

On appeal from the judgment of the Hon'ble Mr. Justice Devadoss, dated the 16th November, 1923, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 721 of 1923.

T. R. Venkatrama Sastri (*The Advocate-General*) for appellant.

Nugent Grant and *K. S. Narayana Aiyangar* instructed by *Messrs. Grant* and *Greatorex* for respondents.

The Court delivered the following

Coutts Trotter, C J.

JUDGMENTS :—*The Chief Justice* :—No one, I think, using language in its natural sense, would ever think of describing this plaint after the excision of the two grounds which Mr. Grant gave up, as being a suit for land, but it is said that there are decisions of this and other Courts which compel such a construction to be put on those words as would bring the present suit within them. It is sufficient for me to say that I do not think that any one of the authorities cited has that effect. I only desire to say one thing ; and that is chiefly in reference to the case in *Srinivasa Aiyangar* v. *Kannappa Chetty* (1) that, if that case is to be supposed to say that you are

*O. S. Appeal No. 109 of 1923. 24th November, 1924.

1. (1915) 30 M L J 120.

Krishnadoss Vithaldoss v. Ghanshamdoss & Narayanadoss.

Coutts Trotter, C. J.

entitled to look at the amended Civil Procedure Code for the purpose of construing the words of the earlier statute, namely the Letters Patent with which we are concerned, I do not agree with it. But I am by no means convinced that that case is an authority for the position for which it was cited. The appeal must be dismissed. The appellant will pay plaintiffs' (respondents') costs. The memorandum of objections is dismissed, no order as to costs.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—The expression "suit for land," it seems to me, must be construed as an action the primary object of which is to establish claims regarding the title to property or possession of property and no suit can be described as a "suit for land" as the result of the decision in which the title to, or possession of, immoveable property will not in any manner or measure be directly affected. Further, the preposition "for" in the expression "suit for land" would seem to indicate that the title to, or possession of, immoveable property must be the primary object of the action. A suit for an office or for the removal of a person from an office is a well-known form of action. This is a suit merely for the accounts of the management of a trust and for the administration of a trust. The decision of this Court, confirmed by the Privy Council in the case of *Srinivasa Murthy* v. *Venkatavarada Aiyangar* (2) is that an action for administration of an estate is not a suit for land even though the whole of the immoveable property belonging to the estate may be outside the local limits of the Court. I do not see how on principle the present suit differs from an administration action. This being a suit for an account of the management of a trust by the first and second defendants and really a suit for the administration of a trust referred to in the plaint, it seems to me that the same principle applies and it cannot possibly be described as a "suit for land," and, therefore, excluded from the jurisdiction of this Court. The learned Judge was right in that decision. I may also add that the original application made on behalf of the 1st defendant to the learned Judge was to revoke the leave to sue granted by the Court. Leave to sue could not possibly have been granted in a case in which the whole of the property, the subject-matter of the suit, was outside the jurisdiction if the suit was a suit for land. Leave to sue was applied for and obtained in this case because all the defendants did

2. (1911) I L R 34 M 257 : 21 M L J 669 (P C).

Krishnadoss Vithaldoss v. Ghanshamdoss & Narayanadoss.

Srinivasa Aiyangar, J.

not reside within the jurisdiction and part of the cause of action may be said to have arisen beyond the jurisdiction of this Court. That leave to sue was granted in the first instance *ex parte*. To revoke that leave would not be to confer or take away any jurisdiction possessed by the Court in respect of the suit if it was a suit for land. Even if the order of the learned Judge refusing to revoke the leave to sue be set aside, the question would still remain whether this Court had jurisdiction in respect of the suit. But Mr. Grant, on behalf of the respondent, intimated that this appeal might be dealt with as though it was an appeal from a decision on a preliminary question whether the Court had jurisdiction to try the action, and, by consent of both the appellant and the respondents, the appeal was so treated. The result of our decision, therefore, is that the Court has jurisdiction in this particular case having regard to the nature of the suit. I agree that the appeal should be dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice*, AND MR. JUSTICE KRISHNAN.

Sreemat Tirumala Tirupati Sreemat Prativadi Bhayankaram Venkatacharyulu Ayyavarlam Garu and others ... *Appellants* in all the appeals*

v.

Nandi Vada Venkatasubba Rao and others ... *Respondents (Defts).*

Venkatacharyulu Ayyavarlam Garu v. Venkatasubba Rao.

Transfer of Property Act, Ss. 55 (4) and 105—Agraharamdar—Grant of lands with occupancy rights—Premium fixed—Promissory note—Suit on—Charge, if can be claimed—English common law rules—Applicability—Madras Estates Land Act, S. 25.

Certain *agraharamdars* owning both *warams* in a village made a grant of the *kudivaram* rights and the grantee promised to pay in addition to the rent, a nazarana or premium. In lieu of this latter amount, a promissory note was executed. In a suit by the *agraharamdars* on the promissory note, they claimed a charge on the land. *Held,* the grant amounted to a lease and not a sale and hence under the Transfer of Property Act there was no charge on the land for the amount agreed to be paid.

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*Appeal No. 168 of 1922 and S A Nos. 623 to 625 of 1921, — 21st January, 1925.

Venkata-charvulu Ayyavarlam Garu v. Venkata-subba Rao.

Per the Chief Justice :—The Transfer of Property Act is intended to be exhaustive as regards charges on immoveable property, and Courts are not at liberty to follow English common law rules.

Per Krishnan, J. :—S. 25 of the Estates Land Act does not allow a lien in respect of premia agreed to be paid.

Observations of Wallis, C. J. in *Kandaswami Pillai* v. *Ramaswami Mannadi*, I L R 42 M 203 held to be obiter and dissented from.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatam in O. S. No. 26 of 1918 and Second Appeals against the decrees of the District Court of Kistna at Masulipatam in A. S. Nos. 183, 181 and 182 of 1919 preferred against the decrees of the Court of the Additional District Munsif of Gudivada in O. S. Nos. 324, 152 and 319 of 1919 respectively.

K. Bhashyam Aiyangar for appellants.

V. Krishna Mohan and *V. Ramadoss* for respondents.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS :—*The Chief Justice* :—In this case the plaintiffs are the owners of an Agraharam village in the sense that they own both the *melvaram* and the *kudivaram* rights. In the year 1909 there was a grant of the *kudivaram* right to the 1st and 2nd defendants and in consideration for that they promised to pay a rent and they also promised to pay what is described as *nazarana* to the landlords and that may be roughly described as a premium for the granting of the *kudivaram* which no doubt was in perpetuity. They gave a promissory note for the amount and the question is whether the debt —because it undoubtedly was a debt—was a mere personal debt affecting the makers of the promissory note or whether it is a charge on the land. In the view that we take of this case the further question, which arose at the trial, viz., whether the 3rd and 4th defendants were *bona fide* purchasers for value without notice, does not arise. It is no doubt true that there is a direct decision in England *Shepheard* v. *Beetham* (1), a decision of Malins, V. C., which treats a premium as creating a lien upon the leasehold premises. Whether that decision is correct or not we are not concerned to enquire although it does seem certainly an astounding result. But, in our opinion, in India the matter is entirely regulated by statute. There is a fundamental distinction under the Transfer of Property Act between a transfer of immoveable property and a transfer of the right to the enjoyment of immoveable property ; and a

1. (1877) 6 Ch D 597.

lease is defined by S. 105 of the Transfer of Property Act as a transfer of a right to enjoy immoveable property made for a certain time, express or implied, or in perpetuity in consideration of the price paid or promised or of money, etc. It is perfectly clear, therefore, that the Transfer of Property Act regards a lease in perpetuity as merely a transfer of the right to enjoy property. Does it or does it not create a charge upon the land? The answer is that the only charge, valid in Indian Law, on landed property, is to be found in the section of the Act which creates such a charge and S. 55 is obviously confined to cases which deal not merely with the transfer of the mere right of enjoyment but with the transfer of the property itself, for, for any other lien or charge, the Act makes no provision at all. In our opinion we are bound to hold that we cannot but regard the Act as intended to be exhaustive and that we are not at liberty to follow English common law rules. On this ground we think the appeal fails and must be dismissed with costs. The Second Appeals (Nos. 623 of 1921, 624 of 1921 and 625 of 1921) will follow and are also dismissed with costs.

Krishnan, J.

Krishnan, J. :—The question that arises for our decision in this case is, whether, when the owner of a land grants a perpetual lease of it in consideration of rent to be paid, as well as a premium, he has got a charge on the leasehold right he has so created for the premium so payable.

The promissory note in this case was executed for such a premium and it is now sought in appeal before us to be enforced not against the makers of the note nor against the persons who took the lease but against certain third parties who have now become transferees or assignees of the lease right. Against them the amount of the note could be claimed if at all, only if there is a charge created in favour of the landlords on the property in their hands.

The English law is apparently that such a lien does exist; but it is not necessary to consider that position here, for, we are concerned only with the Indian Law on the point. The appellant has to show us how he gets the charge. The document by which the lease was created gives him no charge whatever for the amount. Therefore the charge must be rested by him upon the general law of this country. Now so far as it appears the only lien that is recognised in the Transfer of Property Act in this country is a lien in favour of the vendor.

Venkatacharyulu Ayyavarlam Garu v. Venkata Subba Rao.

Krishnan, J

That being so, a strenuous effort was made by the appellant's vakil to persuade us that the grant of a lease like this really amounted to a sale or transfer of a fractional right in the property for a price, namely, the premium payable for the grant and he argued that as vendors of that right the plaintiffs have a charge on the leasehold estate which has been given to defts. 1 and 2. It is impossible to accept this view for the Transfer of Property Act makes a very clear distinction between a sale and a lease. This is a transaction that falls clearly within the definition of a lease in the Transfer of Property Act, S. 105. I do not see how then it could be brought under the definition of a sale. The payment of premium is only one of the incidents of the lease just as payment of rent is. It is certainly not a price paid for the transfer of immoveable property as defined in S. 54 of the Transfer of Property Act. It is impossible, it seems to me, to hold that the relationship between the plaintiffs and defendants 1 and 2 was anything but that of a lessor and a lessee. Apart from the Transfer of Property Act it has not been shown that there is any common law in India on which the right of lien claimed could be founded. It is true that in one of the decisions brought to our notice, *viz., Kandaswami Pillai* v. *Ramaswami Mannadi* (2), there is an observation by the then learned Chief Justice that a lien like that which exists in England may be claimed here. But that observation cannot be treated as authority as it is only an *obiter dictum* of the learned Judge. When that case came on appeal before three other learned Judges of this Court those learned Judges held that the principles of equity in England could not be introduced into India for purposes of creating rights of parties like the one in question. The view of the Chief Justice cannot be treated as of weight after the expression of opinion by the appellate Judges. There is no other decision which has been brought to our notice where such a lien has been recognised in India.

I am, therefore, entirely in agreement with the learned Chief Justice in holding that whatever the position may be in England, we are not justified in introducing new conceptions of charges in India which are not supported by our Statute Law. When the Estates Land Act was passed the Legislature had to consider what kind of charges should be given to the landholder on a leasehold estate. That was the only instance

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2. (1918) I L R 42 M 203 : 36 M L J 313.

in which the Legislature dealt with a lien of the kind claimed and there we find that the lien was not allowed, *see* S. 25 of the Estates Land Act. It seems quite clear that such a lien as is now set up cannot be supported. In the result, the appeal and all the second appeals must be dismissed with costs.

Venkatacharyulu Ayyavarlam Garu v. Venkatasubba Rao.

Krishnan, J.

T. S. V. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE ODGERS.

Deivachilai Aiyangar ... *Appellant** (*Plff.*)

v.

Raghupathi Venkatachariar and others ... *Respondents* (*Defdts.*).

Deivachilai Aiyangar v. Venkatachariar.

Hindu Law—Will by father—Joint family properties—Guardians for minor son—Conveyance by guardians of portion of properties to step-mother for maintenance—Validity of—Breach of trust—Mesne profits—Liability for—Extent.

A Hindu father died leaving a will, whereby he appointed three persons as managers of the joint family properties after his death and as guardians of his minor son. One of the guardians so appointed was the minor's mother. The three guardians acting conjointly conveyed an item of property absolutely to a step-mother of the minor in lieu of her maintenance rights. She died soon after, bequeathing the property to her own brothers. The minor after attaining majority sued to have the alienation set aside and claimed mesne profits from the date of the alienation. *Held,* (1) the will was clearly invalid as a Hindu father is incompetent to dispose of by will joint family property or appoint thereunder guardians to manage the properties on behalf of his minor son. 43 Mad. 824; 41 Mad. 561 followed ; and (2) it was not open to the guardians of the minor, against whom his step-mother had a claim for maintenance, to make her a gift of ancestral property in perpetuity. *Prima facie* it was a breach of trust on the part of the guardians to make a permanent alienation of immoveable property for the purpose of providing for the maintenance of a person who under the Hindu Law was only entitled to be maintained during her lifetime.

Per Odgers, J. :—The transaction cannot amount to a *bona fide* family settlement and be supported on that basis.

Per Spencer, J. :—Where a Hindu mother acting *bona fide* in her capacity of natural guardian of her son, makes a disposition of her son's property, the disposition would not be invalid for the mere reason that other persons who were not authorised to deal with the property, joined in the transaction.

Held, also *per curiam* the alienation made without justification by the guardians was only voidable and not void and on the same being set aside, the son is entitled to mesne profits only from the date of repudiation. If there was no act of repudiation prior to the date of suit, mesne profits can be awarded only from the date of the plaint.

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*Appeal No. 175 of 1922. 5th February, 1925.

Delvachilal Aiyangar v. Venkatachariar.

Appeal against the decree of the Court of the Subordinate Judge of Tuticorin in O. S. No. 42 of 1920.

T. Rangachariar, A. Krishnaswami Aiyar, N. K. Tirumalachariar and *S. Rajagopalachariar* for appellant.

S. Varadachariar and *P. V. Krishnaswami Aiyar* for respondents.

The Court delivered the following

Spencer, J.

JUDGMENTS :—*Spencer, J.* :—Plaintiff is the appellant. He brought this suit for recovery of ancestral property that had come into possession of his step-mother's brothers' families through her will, dated 9th December, 1903. The plaintiff's father died on 30th July, 1900, while plaintiff was a minor. The plaintiff's mother, Nachiar Ammal, was his father's junior wife and Chinnappen Janaki was the name of the senior wife. The 1st defendant and the 3rd defendant's husband are brothers of Chinnappen Janaki, the plaintiff's step-mother. The 2nd defendant is the 1st defendant's son. On 23rd July, 1900, the plaintiff's father executed a written will appointing his junior wife Nachiar Ammal, his sister Alagu Janaki and his aunt's son Ranga Aiyangar as managers of his properties after his death and guardians of the minor plaintiff. In case of difference of opinion among them the decision of Nachiar Ammal was to be final. There was a bequest of 1 acre 63 cents in favour of Ranga Aiyangar and there was also a provision of 6 kottas of paddy and Rs. 25 cash per year for the maintenance of the testator's first wife, Chinnappen Janaki, with the provision, that if she did not accept this allotment, she should have Rs. 1,200 down in cash. The plaintiff's first witness, who is a purohit and also a paternal relation of the plaintiff, deposed that after the plaintiff's father died, Chinnappen Janaki and her brother came and obstructed the performance of the funeral ceremonies and refused to let the corpse be removed from the house until she was given some lands for maintenance in lieu of the paddy and cash provided in the will. This evidence as to coercion of the plaintiff's guardian given by this witness was not rebutted by anything for defendants. On 4th August, 1900, the three guardians appointed under the will entered into an agreement, in which Chinnappen Janaki joined (Ex. II), which contains a statement that the plaintiff's father on his death-bed revoked his written will and orally directed that nanja lands worth Rs. 2,000 and Rs. 1,200 in cash for providing a residence and other nanja lands specified

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Spencer, J.

in the schedule in lieu of the sum of Rs. 1,200 should be given to Chinnappen Janaki for maintenance with all rights of disposal. After this the senior widow Chinnappen Janaki brought a suit (O. S. No. 150 of 1902) for a declaration of her right and for transfer of the patta belonging to the properties allotted to her and obtained a decree *ex parte* as the plaintiff's guardians did not defend it. The plaintiff's stepmother died on 28th December, 1903, after willing away the property in favour of her brothers. Now plaintiff has come of age and sues for recovery of the joint family property which has been improperly alienated. In the Lower Court his suit was dismissed.

The written will of the plaintiff's father was clearly invalid in so far as it purported to dispose by will of joint family property [vide *Subbarami Reddi* v. *Ramamma* (1)] ; and the appointment under it of testamentary guardians to manage the properties of the plaintiff (a minor co-parcener) was also illegal [vide *Chidambaram Pillai*v.*Rangsaswami Naicker*(2)]. The alleged oral will, even if true, was also invalid for the same reason that the plaintiff's father had no power to dispose of immoveable property belonging to the joint family after his death.

The learned Subordinate Judge found under Issue VI (*a*) that the properties covered by Ex. II are joint family properties and this finding has not been challenged. He upheld the alienation under Ex. II both as being a proper provision for maintenance and as being a family settlement of a disputed claim.

The appellant's pleader argues that the plaintiff's mother, acting as his natural guardian, had no power to delegate her authority by taking in two other persons to act with her. If she acted *bona fide* in the capacity of the natural guardian of her son, I should not be inclined to hold that any disposition made by her was invalid for the mere reason that other persons, who were not authorised to deal with the property, joined in the transaction, but the more important question to be decided is whether the alienation of joint family properties can be justified under the circumstances of this case. Regarding it as an act of a guardian of a minor, against whom a claim for maintenance had been preferred, was it a prudent act to buy off an uncertain claim for future maintenance for life by

1. (1920) I L R 43 M 824. 2. (1917) I L R 41 M 561 : 34 M L J 381 (F B).

making a gift of ancestral property in perpetuity ? Chinnappen Janaki might have died immediately after receiving the gift ; in fact, she lived only for three years more, by which time she had parted with her right in the property. *Prima facie* I consider that it was a breach of trust on the part of the plaintiff's guardian to make permanent alienations of immoveable property for the purpose of providing for the maintenance of a person who was only entitled, to be maintained for her lifetime according to the Hindu Law. In Lewin's *Law of Trusts*, 12th Edition, page 710 the general principle is stated to be that, if a trustee does without suit what would have been ordered by the Court and what is compellable by suit his act is valid. If the plaintiff's mother had been appointed guardian by the Court under the Guardians and Wards Act, she would have had to apply under S. 34, cl. (*e*) for appropriating such portion of the income of the ward's property as the Court might direct towards the maintenance of the persons dependent on him. She would have had no power to transfer any part of the immoveable property without the previous permission of the Court (*vide* S. 29), and no Court would have given permission for a permanent transfer of immoveable property without the strongest reasons being forthcoming. The obligation of the minor to maintain his father's senior widow was only co-extensive with the widow's lifetime, and the power of the guardian to alienate the family property must also be regarded as co-extensive with that obligation.

It is argued that the plaintiff's guardians' act can be justified as having saved the plaintiff from being sued for maintenance. As a matter of fact it did not prevent the senior widow from afterwards suing the plaintiff, and if no provision had been made such as that contained in Ex. II and if the widow had sued for maintenance, it is impossible to believe that any Court would have decreed a permanent transfer of ancestral properties to meet a claim for maintenance for life.

In my judgment, therefore, the permanent alienation made under Ex. II was wholly unjustifiable and must now be set aside. The action of the plaintiff's guardians in not defending O. S. No. 150 of 1902 must, in this view of the case, be regarded as grossly negligent.

The appeal is, therefore, allowed and the plaintiff will be given a decree as prayed for in his plaint except as to his claim for mesne profits from 20th December, 1903. As regards

mesne profits, the alienation by the plaintiff's guardian being voidable, as explained in *Bhirgu Nath Chaube* v. *Narsingh Tiwari* (3) and *Subba Goundan* v. *Krishnamachari* (4) and not having been repudiated before the institution of this suit, I agree with my learned brother in thinking that the plaintiff is entitled to mesne profits at the rate found by the Lower Court to be fair from the date of suit only and the decree will provide accordingly. The decision in *Saraj Ranjan Choudhry* v. *Premchand Choudhry* (5) to which our attention was drawn at the eleventh hour is not in point. There is no doubt that a plaintiff could not under any circumstances recover mesne profits for more than three years before suit as that remedy would be barred by Art. 109, Limitation Act. That is all that the case is an authority for. As each side has succeeded in part, each will bear his own costs in the appeal.

Odgers, J. :—I agree. My learned brother has dealt with the reasons why the first ground on which the learned Subordinate Judge supported this claim, namely, that it was a proper provision for maintenance, cannot be supported. I am also of opinion that the second ground, namely, that it was a family settlement, or, as it was well stated, as being the price of family peace, equally cannot be supported. That the senior widow had a claim for maintenance is of course not disputed. The only question was as to its quantum ; and, in my opinion, it cannot be said that it was a *bona fide* buying off of a settlement of family dispute when that was the only question.

After our judgment in this appeal had been pronounced, a discussion arose regarding the mesne profits which ought to be allowed to the plaintiff who has succeeded in the appeal before us.

It is contended for the appellant that mesne profits should be allowed from the date of the alienation by the plaintiff's guardian which we have held in our judgment to be wholly unjustifiable and have accordingly set aside. On the other hand, the respondent contends that the alienation being only voidable and not void, mesne profits can only be awarded from the date when the alienation is set aside, *i. e.*, by reference back, to the date of the plaint. The question therefore arises as to whether the alienation evidenced by Ex. II is void *ab*

3. (1916) I L R 39 A 61. 4. (1921) I L R 45 M 449 : 42 M L J 372.
5. (1917), 22 C W N 263.

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Odgers, J.

initio or only voidable. There is no doubt on the authorities that the alienation by a Hindu widow of her husband's estate as against a reversioner is good until the sale is set aside. For instance, in *Rangaswami Goundan* v. *Nachiappa Goundan*(6) it was held that "when the alienation of the whole or part of the estate is to be supported on the ground of necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction, will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one." See also *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (7) where their Lordships say referring to the alienation of the Hindu widow : "Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir." That being the state of the law with regard to the alienation of a deceased husband's estate by a Hindu widow, does it make any difference if the alienation is not by a Hindu widow as such but by her as guardian for her minor son who takes it as the estate of the deceased father ? Apparently there is no difference in principle and it has been held by the Calcutta High Court in *Krishna Dhone* v. *Bhagaban Chandra* (8) that a sale of a minor's property in fraud of his rights is only voidable and is valid till avoided. After the argument was concluded we were referred by Mr. Bhashyam to a statement in *Saraj Ranjan Choudhry* v. *Premchand Choudhry* (5). That was a case of limitation, where the question arose whether Art. 109 of the Limitation Act was applicable to a suit for mesne profits where possession had been obtained by the defendant under a sale subsequently set aside. The appeal was originally heard by Doss and Richardson, JJ., who differed in opinion. Doss, J., at page 267 says : "It is only when the sale is finally set aside by a suit or the decree is finally reversed on appeal that the possession by virtue of the ultimate judicial declaration becomes wrongful, not merely from the time when such declaration is pronounced but *ab initio, i. e.*, from the time the unsuccessful party or the purchaser was installed into possession," and he held that the plaintiff could recover mesne profits for the whole time during which the defendant had been in possession. Richardson, J.,

5. (1917) 22 C W N 263.
6. (1918) I L R 42 M 523 : 36 M L J 493 (P C).
7. (1907) I L R 34 C 329 at 333 : 17 M L J 154 (P C).
8. (1916) 34 I C 188.

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differed holding that the claim for mesne profits for more than three years before suit was barred. On the hearing of the Letters Patent Appeal by three Judges, the opinion of Richardson, J., prevailed. If therefore the dictum of Doss, J., is treated as applicable to the facts of the present case, of which I am not convinced, it would appear to have been overruled. In *Subba Goundan* v. *Krishnamachari* (4) there was a suit instituted by the co-parceners to set aside a sale of ancestral immoveable property by the Manager on the ground that the sale was not for family necessity. Here again it was said by the learned Judges (Kumaraswami Sastri and Devadoss, JJ.) that in the case of sales by a father or managing member of a joint family for alleged necessity the sale will be good till avoided as it is open to the other co-parceners to affirm the transaction. The learned Judges there followed the ruling in *Bhirgu Nath Chaube* v. *Narsingh Tiwari* (3) and limited the claim for mesne profits to the period from the date of suit as there was no repudiation before the suit. I do not think that the fact that the plaintiff could not, until he had attained majority, elect to either affirm or disaffirm the transaction can make any difference in principle. By reason of his disability the law gives him no title to assert his legal rights until his disability is at an end. The learned vakil for the plaintiff referred to a decision of the Privy Council in *Bhagwat Dayal Singh* v. *Debi Dayal Sahu* (9) but nothing can be gleaned from the judgment of their Lordships of the Privy Council in that case as to the period for which mesne profits should be allowed. Their Lordships held that as the sale deeds in question were invalid as such, the claim for mesne profits was well founded and the amount would be as ascertained in execution proceedings. The decision, therefore, does not affect the present case. On these considerations and on the state of the authorities, I am of opinion that in this case the mesne profits should be allowed from the date of suit and I would direct accordingly.

T. S. V. *Appeal allowed.*

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3. (1916) I L R 39 A 61.
4. (1921) I L R 45 M 449 : 42 M L J 372.
9. (1908) I L R 35 C 420 : 18 M L J 100 (P C).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE KRISHNAN.

Arumuga Thambiran and others ... *Appellants** (*Plaintiffs 1 to 4 and Supplemental Plaintiff*)

v.

Namasivaya Pandara Sannadhi and others ... *Respondents* (*Petitioner in I. A. No.* 614 *of* 1920 *in O. S. No.* 71 *of* 1918, *Petitioner in I. A. No.* 711 *of* 1920 *in O. S. No.* 71 *of* 1918 *and L. R. of the Petitioner in I. A. No.* 711 *of* 1920 *in O. S. No.* 71 *of* 1908)

Arumuga Thambiran v. Namasivaya Pandara Sannadhi.

Civil Procedure Code of 1908, *S.* 92—*Suit for removal of defendant from office of Pandara Sannadhi and for framing a scheme for mutt—Death of defendant pending—Cause of action if survives as regards relief for framing a scheme*—Res judicata—*Opinion in interlocutory proceedings not necessary for disposal of same if—Religious Endowments Act of* 1923—*Not retrospective.*

Pending a suit under S. 92, Civil Procedure Code, for the removal of the defendant from the office of Pandara Sannadhi and for the framing of a scheme in relation to the Mutt, the defendant died. The question arose whether the suit abated even with reference to the second relief prayed for, namely, the framing of the scheme.

Held that it did not and that the cause of action survived against the representative of the deceased defendant for the purpose of framing a scheme.

The two reliefs are distinct, though the second relief is to a certain extent dependent on the first, because it is necessary to allege a breach of trust in order to constitute the necessary cause of action.

Held further that the question was not *res judicata* by reason of the opinion previously expressed by the High Court in an application for the appointment of a Receiver in the suit, the opinion being to the effect that the prayer for a scheme was not an independent relief asked for, but was only incidental to the prayer for removal of the defendant.

There is nothing in the new Religious Endowments Act which gives its retrospective effect in respect of proceedings already instituted.

Appeals against the decrees of the Court of the Subordinate Judge of Kumbakonam in O. S. Nos. 71 and 72 of 1918.

S. Srinivasa Aiyangar, S. Muthiah Mudaliar, A. C. Shanmugha Nainar, K. S. Jayarama Aiyar and *S. V. Narayana Aiyar* for appellants.

T. Rangachariar, R. Sadagopachariar, V. N. Venkatavaradachariar and *K. Subramaniam* for respondents.

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*Appeals Nos. 43 and 44 of 1921. 26th February, 1925.

The Court delivered the following

Arumuga Thambiran v. Namasivaya Pandara Sannadhi.

JUDGMENT :—The plaintiffs in this case have brought their suits under S. 92 of the Code of Civil Procedure for the removal of the defendant from the office of Pandara Sannadhi and for the framing of a scheme in relation to the Mutt. The Advocate-General has also joined the suit as a supplemental plaintiff. After the institution of the suit and before it was tried the defendant died, and the Subordinate Judge has held that owing to the defendant's death the suit has abated and cannot be revived on the ground that it is a personal action against the defendant and that the second relief in the suit, namely, that of the framing of the scheme, is an ancillary relief dependent on the removal of the defendant from his office of trustee. Against this decision the plaintiffs have appealed ; and it is contended in the appeal that as two reliefs are claimed, namely, the removal of the defendant and the framing of the scheme, which are distinct and separate reliefs, the suit may well be prosecuted with reference to the second relief, namely, the framing of the scheme. It is pointed out that in a very similar case it was held by the Privy Council that the cause of action did survive. [*Rajah Anand Rao* v. *Ramdas Daduram* (1)]. Apart from this authority we have also a case in this Court *Sivagnana Desika Gnanasambanda Pandara Sannadhi* v. *The Advocate-General of Madras* (2), in which the same conclusion was arrived at. Although the plaint is mainly taken up with allegations of misconduct on the part of the respondent and the prayer for the scheme is only mentioned at the end of the plaint, without giving any special reasons why the scheme is necessary, yet, when we come to read S. 92 of the Code of Civil Procedure it is quite clear that in order to provide a cause of action for a scheme suit there must be an allegation of a breach of trust or it must, otherwise, be necessary to obtain directions of the Court. In order, therefore, to justify this suit for a scheme it is necessary for the plaintiffs to allege a breach of trust and it is very difficult to see how this second relief can be deemed to be ancillary to the removal of the defendant. It is absurd to suppose that the plaintiffs and the Advocate-General have merely brought this suit to satisfy a vindictive spite against the defendant and that that is their sole cause of action, and, consequently, that the rest of the suit must fail as the defendant can no longer be held

1. (1920) I L R 48 C 493 (P C). 2. (1915) 28 M L J 174.

Arumuga Thambiran v. Namasivaya Pandara Sannadhi

responsible. The two reliefs are distinct ; the second relief is to a certain extent dependent on the first, because it is necessary to allege a breach of trust in order to constitute the necessary cause of action.

Mr. Rangachariar for the respondent has not referred us to any authority against those cited above; and we are satisfied that the cause of action does survive against the representative of the deceased defendant for the purpose of framing a scheme. We may also observe that, in addition to the prayer for the scheme generally there is a prayer for directions as to the utilisation of the surplus funds of the institution, which are alleged to be very large indeed.

A further objection is taken for the respondents that this question is *res judicata* in that it has already been decided by a Bench of this Court which disposed of an application for the appointment of a Receiver in this suit. No doubt that Bench in its judgment says, "the plaint before us deals only with the misconduct of the deceased Pandara Sannadhi and does not refer to the absence of any means of preventing it," and again, "in paragraph 21, where the necessity for a scheme is suggested, it is referred to only in connection with the removal of the then incumbent, not as independently justifiable on its merits." It is contended that this judgment has decided the present appeal. This appeal was not before that Bench, nor do we think that it purported to decide it. Mr. Rangachariar relies on three decisions of the Privy Council reported in *Ram Kirpul Shukul* v. *Mussumat Rup Kuari* (3) ; *Hook* v. *Administrator-General of Bengal* (4) and *Sir Rameshwar Singh* v. *Hitendra Singh* (5). In these cases the principle was laid down that S. 11 of the Code of Civil Procedure is not exhaustive on the question of *res judicata ;* but all these cases can be distinguished from the present one, in that the prior decision which was relied upon as binding on the parties in subsequent proceedings between them was with reference to a question which directly arose and had to be decided in the prior proceedings, being directly in issue. In the present case, however, there was no necessity to decide this appeal in an application for the appointment of a Receiver ; and although the Bench expressed an opinion as to the meaning of the plaint in this suit as a reason for refusing to appoint a

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3. (1883) L R 11 I A 37.
4. (1921) I L R 48 C 499 (P C).
5. (1924) 47 M L J 286 (P C).

Receiver, it can certainly not amount to *res judicata* in the sense applied by the Privy Council in the above cases. For this proposition we need only refer to ***Massam* v. *Thorley's Cattle Food Company*** (6). Apart from this we are not at all clear that that Bench of this Court did really decide the point, for they merely said : "It is not clear that the respondents' claim to a scheme, the only relief for which they can now ask, can be supported separately on the allegations they have made." That merely amounts to saying that they have not definitely proved in these interlocutory proceedings the question which has now been argued before us. In any case it does not amount to *res judicata*. With all respect for the opinion expressed in that judgment, we have now come to a contrary conclusion.

A further suggestion is made that this suit may be affected by the recently passed Religious Endowments Act ; but there is nothing in that Act which gives retrospective effect in respect of proceedings already instituted, and therefore this objection also must fail.

This appeal, therefore, is allowed with costs and the suit will be remanded to the Lower Court for disposal according to law. Court-fee on the appeal memorandum will be refunded.

Appeal No. 44 of 1921 is not pressed and is dismissed with costs of the 20th respondent.

These appeals having been set down to be spoken to this day the Court delivered the following

JUDGMENT :—Appellants 3 and 4 are allowed to withdraw and the judgment in Appeals Nos. 43 and 44 of 1921 will stand as regards appellants 1, 2 and 5.

A. S. V. *Appeal No. 43 allowed.*
Appeal No. 44 dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

Appa Pai (dead) and others ... *Appellants** (*Defendants & L R of the 1st defendant*)

v.

Somu and another ... *Respondents* (*Plaintiffs*).

Appa Pai v. Somu.

Transfer of Property Act, Ss. 83, 84—Tender of mortgage money—Validity—Conditions—Minor mortgagee—Guardian for—Appointment of—Mortgagor

*S. A. No. 392 of 1922. 4th February, 1925.

6. (1880) 14 Ch D 748.

Apra Pai v. Somu.

under a duty to sue to—Omission to do so—Effect on validity of tender—Joint Hindu family—Mortgage amount due to—Manager—Right to receive amount without giving security for minor—Tender insisting on such security—If a conditional tender.

The plaintiff was the mortgagor. The defendants were the sons of the original mortgagee and consisted of two brothers, a major and a minor, respectively. The plaintiff presented a petition under S. 83 of the Transfer of Property Act praying that the amount deposited by him might be ordered to be paid to the counter-petitioners (the defendants) after obtaining security for the minor if necessary. The 1st defendant (the adult son) filed a statement contending that, as head of the joint family, he was entitled to receive the amount without furnishing any security and that he was willing to receive the amount if it was paid to him. The vakil for the 1st defendant had no authority to appear for the minor, the minor was not represented at all, and the 1st defendant refused to receive the amount by giving security. The Court held that it was not possible to order the payment.

In a suit by the plaintiff to oblige the defendants to accept the mortgage amount deposited by him, the question was whether the tender was a valid tender.

Held, reversing the Courts below, that under S. 84 of the Transfer of Property Act it was the duty of the plaintiff (mortgagor) to sue that the minor was properly represented by the appointment of a guardian, and that, as he had not taken the necessary steps for that purpose, the tender was not a valid tender under S. 83 of the Act.

Quaere. Whether the tender was not a conditional tender in that security was demanded for the minor.

Second Appeal against the decree of the District Court of South Kanara in A. S. No. 55 of 1921 preferred against the decree of the Court of the District Munsif of Puttur in O. S. No. 342 of 1920.

K. Yegnanarayana Adiga for appellants.

K. Sundara Row for respondents.

The Court delivered the following

JUDGMENT:—In this case the plaintiffs brought a suit to oblige the defendants to accept a mortgage amount which plaintiffs deposited in Court under S. 83 of the Transfer of Property Act. There is no dispute as to the amount. The defendants are the sons of the original mortgagee and consist of two brothers, a major and a minor respectively. The petition under S. 83 was presented on the 17th March, 1920, and prayed "that the undermentioned amount may be ordered to be paid to the counter-petitioners after obtaining security for the minor, if necessary, etc." The first counter-petitioner filed a statement in answer to this petition on the 21st of April, 1920, in which he stated that he was the Ejaman of the family, that the petitioner had refused to pay the amount

to him and had deposited it in Court and that the petitioner is not entitled to ask for security. He adds, " If the petitioner is willing to pay the said amount to me, I consent to receive the amount." On this, the District Munsif ordered the petition to be recorded observing that the vakil who appeared on behalf of the 1st counter-petitioner had no authority to appear for the minor, that the 1st counter-petitioner refused to receive the amount by giving security, that he was the guardian (I presume he means natural guardian) of the 2nd counter-petitioner and that the former was absent. The District Munsif held that it was not possible to order the payment. Hence the suit.

The District Munsif in the suit held that the 1st defendant by his conduct in not having entered the appearance of the 2nd defendant disabled the Court from ordering the payment apart from the question of security. So he held that the tender in Ex. A was valid. The District Judge upheld the decision of the District Munsif. The plaintiffs' explanation as detailed by the District Judge as to why they made the offer of payment conditional is that they believed the mortgage money to have been the self-acquisition of the father so that the two defendants would take equally as heirs and not as survivors. I cannot say that the explanation is very lucid and no attempt has been made to explain it by the learned Vakils who are appearing before me. The question is entirely technical and Mr. Yegnanarayana Adiga for the appellants contends that the tender is invalid because in fact the mortgagor has omitted certain formalities which are necessary under the provisions of the Transfer of Property Act and the Code of Civil Procedure before this can be held to be a valid tender. The chief section we are concerned with here is S. 84 which provides that interest shall cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take certain amount out of Court. The objection here is that it is for the mortgagor to carry out all the requirements of the law and not the mortgagee, so that in this case the mortgagor having joined in his petition the minor defendant with the major ought to have seen that the minor was properly represented by the appointment of a guardian in order that the Court might be able to order the money to be paid. It must be remembered it is not a case of a deposit to the credit of persons entitl-

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ed to a definite share in the mortgage money but that these two persons were members of an undivided Hindu family. There seems to be a dearth of authorities for the proposition that has been advanced in Madras. But in *Pandurang* v. *Mahadaji* (1) a Bench of the Bombay High Court held in a similar case that it was the duty of the mortgagor not only to apply for the appointment of a guardian *ad litem* but to see that one was appointed, and that for the purpose of a tender under the Transfer of Property Act, it is incumbent on the mortgagor to procure the appointment of a guardian *ad litem* and that, until such an appointment has been made, there is no one to whom under the Act the tender on behalf of the minor could be made. The same view seems to prevail in Allahabad. *Sheo Saran Choudhri* v. *Ram Lagan Das* (2) has been referred to on both sides. On behalf of the respondent here it is relied on as showing that, where a mortgage is in reality a mortgage taken by the head of a Hindu family, the mortgage money being supplied from the joint family funds, it may well be held that an offer to pay the money due on such a mortgage to the managing member is a good and valid tender. It is said in this case that there was such an offer, but the wording of the petition shows that it was not so. The amount was prayed to be paid to the counter-petitioners after obtaining security for the minor, if necessary. A point might have been taken that this is a conditional tender. But as I have come to my conclusion on other grounds it is unnecessary to definitely decide that this was a conditional tender. Now in *Kannu Mal* v. *Indarpal Singh* (3) it was held on a construction of Ss. 83 and 84 that where the mortgagee is a person who is unable to draw the money out of Court, it is necessary that a guardian *ad litem* should be appointed and therefore unless such a guardian was appointed it cannot be said that the mortgagor had done all that was necessary for him to enable the mortgagee to draw the money (*cf.* S. 103 of the Transfer of Property Act and O. 32, R. 6 of the Code of Civil Procedure). It has been held by a single Judge of this Court (Oldfield, J.) in a case reported in *Krishna Aiyar* v. *Chakrapani* (4), that the next friend of a minor plaintiff, even if he is the managing member of a joint Hindu family of which both are members, is not entitled to draw money from Court on behalf of the minor plaintiff without furnishing security.

1. (1902) I L R 27 B 23 at 29.
2. (1921) I L R 44 A 64.
3. (1922) I L R 45 A 273.
4. (1915) 29 I C 475.

On the other side I am referred to a case of the Privy Council reported in *Walian* v. *Banke Behari Pershad Singh* (5) in which their Lordships held that in the case before them the absence of a formal order appointing the mother as guardian *ad litem* was only an irregularity and the irregularity could be cured. There it was uncertain whether there had been a formal order of appointment as the appointment, if made, would have been made 14 years before the question arose, and the mother had appeared throughout the proceedings as guardian. It does not appear to me that the facts of that case in any way resemble those of this case, or can constitute an authority to bind me.

I must, therefore, hold that the mortgagor has not performed what the law requires to be performed when a deposit is made under S. 83 of the Transfer of Property Act and that the Lower Court was wrong in holding that he had. There was, therefore, in my opinion no valid tender under S. 83, and, therefore, there is in my view no question of interest on this mortgage.

A question is raised as regards costs. The appellant here failed in both the Lower Courts and had to pay the respondents their costs. My order as to costs in the Lower Courts is that each party should bear their own costs. With regard to costs here the appellants must have them.

The appeal is therefore allowed with costs in this Court.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Solaimalai Thevan ... *Petitioner** (*Plff.*)

v.

Sinnathambi Padayachi ... *Respondent* (*Deft.*)

Solaimalai Thevan v. Sinnathambi Padayachi.

Indian Tariff Act (VIII of 1894), S. 10—"Increase"—Meaning of—Contract for sale after increase of tax—Levy of tax afterwards—Lien on goods sold.

The word "increase" in S. 10 of Act VIII of 1894 refers to the act of Government and not to the levy of the excise at the factory. It has no reference to parties, who enter into a contract of sale, after the increase of the tax, although they themselves may never have heard of such increase.

The defendant sold some maunds of salt to the plaintiff. Even before the sale, the duty on salt had been increased, but the former was not aware of it.

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*C. R. P. No. 495 of 1923. 23rd September, 1924.

5. (1903) I L R 30 C 1021 (P C).

Solaimalai Thevan v. Sinnathambi Padayachi.

The excess duty on the salt sold was levied from him even while a portion of the salt remained undelivered and to recompense himself he sold it to others. *Held,* he had no vendor's lien and the buyer was entitled to claim their price as on the date when they were taken by the defendant.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree and judgment of the Court of the Subordinate Judge of Mayavaram in S. C. S. No. 473 of 1922.

V. Sundaresa Aiyar for petitioner.

C. A. Seshagiri Sastri for respondent.

The Court delivered the following

JUDGMENT :—On 1st March, 1922, at 9 A. M., the plaintiff bought 120 maunds of salt from the defendant, which were separated and packed in 60 of the plaintiff's own gunny bags. He took away 35 bags and left 25 in the custody of the defendant. That evening the excise-man made the defendant pay Rs. 150, enhanced salt duty on the 60 bags, which he had sold. Having heard that the duty of excise was increased from the commencement of March 1st, to recompense himself the defendant sold the 25 bags to other persons. Subsequently, the excise-man, who was acting under a misapprehension, refunded the excess duty to the defendant. The plaintiff sued for the value of his 25 bags of salt, on the date, when they were taken from him by defendant. The short point for determination is whether defendant was justified in selling these 25 bags. The Subordinate Judge finds, without giving any reason for his finding, that the defendant had a lien for the excess duty payable on the 25 bags left in his custody, and therefore, he had a right to sell the bags.

The counter-petitioner supports this finding by reference to S. 10, Act VIII of 1894.

In the event of any duty of excise, on any article being imposed, increased, decreased or remitted, after the making of any contract for the sale of such article, if such increase so takes effect that the increased duty is paid, the seller may add so much to the contract price, as will be equivalent to the increase of duty and shall be entitled to recover such addition.

" Increase " in this section refers to the act of Government and not to the levy of the excise at the factory. Any party who had contracted before March 1st and whose contract was still subsisting (that is to say, in the words of the English Statute, before there had been clearance and delivery, 39, 40 Vict. c. 20) would come within the mischief of S. 10; but

it has no reference to parties who enter into a contract of sale after the increase of the tax, although they themselves may never have heard of such increase.

If the Subordinate Judge acted with reference to S. 10, his mistake, in all probability, was that he took imposition to mean levy. The levy was at 9 P. M., but the imposition was from mid-night 28th February to 1st March. I have not been shown any other provision of law giving defendant a vendor's lien in the circumstances of this case. The petition is, therefore, allowed with costs throughout, and plaintiff is given a decree as prayed for, the decree of the Lower Court being reversed. The fact that the market rate was due to a misunderstanding of the intentions of Government is no reason for not allowing plaintiff to claim recompense at the rate. I accept the finding that the rate is Rs. 6-12-0 per bag.

T. S. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Kondagunta Mrutyanjaiah and others ... *Appellants* in all (Plaintiffs)*

v.

Malle Venkatapathigadu and others ... *Respondents (L. Rs. of defendants).*

Madras Estates Land Act—Rent—Rate of—Dry and garden lands irrigated with tank water with landlord's permission—Rate to be charged in case of—Patta—Provision for payment of cess to village servants—Inclusion of—Propriety.

In a case in which dry and garden lands were irrigated with tank water with the landlord's permission, both the Courts concurred in holding that Rs. 6 per acre—the highest wet-rate levied by Government in the District—was the reasonable amount of compensation to be paid by the tenant, and in fixing that amount :

Held, that the law was not that the wet rate was the proper rate to fix for such lands, and that the Courts below were perfectly justified in holding that to award a reasonable compensation was the proper method of fixing the rate chargeable.

Held further that the Courts below were right in ordering the omission from the patta of a provision for payment of a certain cess to the village servants and not to the landlord.

Second Appeals against the decrees of the District Court of Nellore in A. S. Nos. 74 and 80 to 89 of 1921 respectively preferred against the decrees of the Court of the Deputy Col-

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*S. A. Nos. 1328 to 1338 of 1923. 26th February 1925.

Mrutyanjaiah v. Venkatapathigadu.

lector of Gudur Division in S. S. Nos. 229, 231, 232, 234, 235, 236, 238 to 241 and 244 of 1919.

A. Krishnaswami Aiyar for appellant.

B. Somayya for respondent.

The Court delivered the following

JUDGMENT :—The main point raised in these appeals is the rate to be charged when dry and garden lands are irrigated with tank water with the landlord's permission. The appellants claimed 2 1|2 tooms per quarter cawnie. Presumably they mean 2 1|2 tooms of paddy but this is quite clear from the patta itself. The Deputy Collector found that Rs. 6 per acre was a reasonable rate and fixed that amount. His finding is accepted by the District Judge, and it is now contended that this finding cannot be supported. Neither the first nor the Lower Appellate Court has given definite reasons for considering this reasonable, but the Deputy Collector who is a Revenue Officer must have been aware of the fact that the highest wet rate levied by Government in the Nellore District is Rs. 6 per acre, and it was open to him to act on that knowledge and come to the conclusion that he did. The tenants made an offer at this rate which he accepted. The Judge has merely agreed with him, but I do not see any reason for setting aside the finding. It is, however, argued that under the law the wet rate is the proper rate to fix for such lands, and reliance is placed on a ruling in *Venkatachalam Chetty* v. *Aiyamperumal Thevan* (1), to which I was a party. In that case it was held that the landlord was entitled to a reasonable compensation for the use of his water, a principle which has been acted upon consistently by this Court. In the circumstances of that particular case, it was held that the charge of *sarasari*, which is the wet rate, was not unreasonable in view of the fact that there had been an old custom in that Zamindari to levy that rate ; but this is not an authority for saying that the reasonable amount of compensation must be the same in every village or District, *i. e.*, wet rate. In the present case both the Courts have found what is the reasonable amount of compensation, and what was the proper method of fixing the rate chargeable. I see no reason to interfere with that finding.

The second ground of appeal relates to the charge on garden lands liable to submersion. This ground was not taken in the appeal memorandum, and although additional

1. (1919) I L R 42 M 702 : 37 M L J. 248.

grounds have been filed, no valuation of this claim has been given and no stamp duty paid. So I must decline to discuss it.

The third point is that the provision for payment to village servants of a certain cess should be inserted in the patta. The payment is not to be made to the landlord but to the village servants, and it is a question between them and the pattadar. The Lower Courts were, therefore, right in ordering that this clause should be omitted. The appeal is accordingly dismissed with costs. Costs will only be payable in S. A. Nos. 1329 to 1332 and 1334, and vakil's fee for all these appeals together is fixed at Rs. 100.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Mr. E. C. Kent ... *Petitioner* (Counter-petitioner in Mis. C. C. No. 18 of 1924 on the file of the Court of the District Magistrate, Civil and Military Station, Bangalore)*

v.

Mrs. E. E. L. Kent ... *Respondent (Petitioner in do.)*

Criminal Procedure Code, S. 488—Maximum of Rs. 100 fixed by—Applicability—Wife and children—Application on behalf of—Maximum if applicable to case of—"In the whole"—Meaning—Maintenance—Offer to maintain not enough—Alimony to wife—Order for payment of—If and when a bar to application by her under S. 488.

The wife of the petitioner made an application under S. 488, Criminal Procedure Code, on behalf of herself and of her two children, and the Magistrate awarded a sum of Rs 300, Rs. 100 for the wife, and Rs. 100 for each of the two children. *Held,* that the order was not *ultra vires.* The maximum of Rs. 100 fixed by the section is the maximum awardable to each of the applicants.

Meaning of "in the whole" in S. 488, Criminal Procedure Code. A mere offer to maintain is not sufficient under the section.

The existence of an order of the Probate, Divorce and Admiralty Division of the High Court in England whereby the husband is directed to pay his wife so much alimony per month is no bar to an application by the wife under S. 488, Criminal Procedure Code, if, in fact, the husband has neglected to maintain his wife. So long as the husband does not maintain the wife, either by payment of alimony or otherwise, the Magistrate's jurisdiction to order him to pay maintenance is not taken away.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate, Civil and Military Station, Bangalore, in Mis. C. C. No. 18 of 1924.

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*Cr. R. C. No. 98 of 1925. 27th March, 1925.
(Cr. R. P. No. 90 of 1925).

Mr. E. C. Kent v. Mrs. E. E. L Kent

Vere Mockett instructed by *Messrs. Short, Bewes and Co.* for petitioner.

E. L. Thornton for respondent.

The Public Prosecutor for the Crown.

The Court made the following

ORDER :—This is an application to revise the order of the District Magistrate, Civil and Military Station, Bangalore, directing the petitioner to pay Rs. 300 a month under S. 488 of the Code of Criminal Procedure. The petitioner is a well-to-do planter who neglected to maintain his wife and two children. The wife made an application to the District Magistrate and he has passed the order which is sought to be revised.

The first contention on behalf of the petitioner is that under S. 488 the Magistrate has jurisdiction to award only Rs. 100 in all for the support of the wife and the children. Mr. Mockett, who appears for the petitioner, relies upon the words " Rs. 100 in the whole " and argues that the Magistrate cannot award more than Rs. 100 in all for the support of the wife and the children and that the award by the Magistrate of Rs. 300, Rs. 100 for the wife and Rs. 100 for each of the children is *ultra vires*. Clause 1 of S. 488 reads as follows :—

" If any person having sufficient means neglects or refuses to maintain his wife, or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, etc., may, on proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate not exceeding one hundred rupees in the whole, as such Magistrate thinks fit."

To contend that when a woman makes an application for herself and for children she could only be given Rs. 100 for the maintenance of herself and of her children whatever be the number, is opposed to the clear wording of the section. If the petitioner's construction of the section is correct, it would amount to this : if a person has an illegitimate child and an application is made under this section and Rs. 100 is awarded to that child and if that person afterwards refuses to maintain his wife and his legitimate children, the wife and the legitimate children would have no remedy against him, for the sum of Rs. 100 has already been awarded for the support of the illegitimate child, and no further order can be made on behalf of the wife and legitimate children as no Magistrate can award more than Rs. 100 for all the persons whom he is bound to maintain.

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This section was enacted to suit Indian conditions. A Muhammadan can legally marry four wives at the same time; supposing he neglects or refuses to maintain one wife and her children and supposing she obtains an order under this section and gets Rs. 100 and if he afterwards refuses or neglects to maintain any of the other wives and children, they would be helpless, and if he refuses to maintain all the four wives at the same time, is it to be said that the section requires that all the four wives should apply by a joint petition for payment of maintenance to them and their children ? Supposing a European has legitimate children by a deceased wife, and children by a living wife and also illegitimate children, supposing the illegitimate children obtain an order for their maintenance and the Magistrate directs the payment of Rs. 100 for their maintenance and if the man after some time refuses to maintain his legitimate children by the deceased wife, are they to be without any remedy ? And still further, if he refuses to maintain his wife and legitimate children are they to be without any remedy ? I think the contention that a person can only be ordered to pay Rs. 100 for the support of his illegitimate children, for the support of his family by the deceased first wife and for the support of the living wife and her children is, on the face of it, an untenable one.

Mr. Mockett relied upon the summary jurisdiction of Magistrates; Act 58 and 59 Vict. c. 39, s. 5, cl. (*c*) and contended that the sum awardable under that section was for the maintenance of the wife and the children with her, and a Magistrate has no power to award more than £2 a week. S. 5, cl. (*c*) gives the Court of summary jurisdiction power to make an order among other things for the legal custody of the children under 16 years of age, and an order for maintenance under cl. (*c*) which is as follows :—

"A provision that the husband shall pay to the applicant personally or for her use to any officer of the Court, or a third person on her behalf, such weekly sum not exceeding £2 as the Court shall, having regard to the means both of the husband and the wife, consider reasonable."

There is no provision in this section for the payment of any amount for the maintenance of any child unable to maintain itself. But the Justices in considering what amount should be awarded to the wife may take into consideration what would be required for the maintenance of the child or children in the custody of the wife. The maximum is fixed at £2 a week, as the object of the Act is to give relief to the

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wife. There are other enactments like the Bastardy Act and the Poor Law Act under which a father could be made to pay maintenance for his illegitimate and legitimate children.

The case of *Hill* v. *Hill* (1) does not help the petitioner. Sir Francis Jeune, President of the Probate Division, observes as follows at page 142 :—

> "Therefore the whole sum ordered is to be paid to the applicant personally. There is in the Act no express power to order that sums shall be paid for children, even the children of his (the husband's) own marriage. But in considering what amount should be ordered to be paid by the husband, if the justices were right in taking into account the expenses of maintaining any child or children of the marriage, they would be equally justified in taking into account the expenses in respect of children whom the husband under the Poor Law, at any rate, was legally liable to maintain and they were right in ordering such amount to be paid,—as only it could be paid—to the wife."

58 and 59 Vict. c. 39 was specially enacted for giving speedy relief to married women who, on account of desertion or neglect on the part of their husbands to maintain them, have to seek speedy remedy for provision for maintaining themselves. That Act is not similar to S. 488 which specially provides for the maintenance of "wife and child legitimate or illegitimate, which is unable to maintain itself."

In considering what amount should be paid for the wife it need not be taken into consideration whether she has children to be maintained or not. The position of the husband and his means and the position of the wife alone should be considered. In the case of each child the needs of the child should be considered. The words "in the whole" mean that only a sum of money not exceeding Rs. 100 should be ordered to be paid and no other payment either in the shape of fees or medical expenses, etc., should be ordered to be paid ; nor can the Magistrate order the husband to provide a house for the wife. It is to prevent the Magistrate making an order that the husband should pay so much for the schooling of the children, or so much for clothing or so much for medical expenses and so on, that the words "in the whole" have been put into the section. The Magistrate can only order one sum not exceeding Rs. 100 to be paid for the wife and for each of the children unable to maintain itself.

The section speaks of "wife or his legitimate or illegitimate child" and does not speak of "wife and child." The words have to be given their plain meaning. To construe the

1. (1902) P 140.

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words as meaning wife and children is opposed to all rules of construction. If a man has the luxury of more wives than one, his liability to maintain them is not lessened thereby. Every wife and every legitimate child and every illegitimate child could be awarded up to Rs. 100 provided the husband or the father has the means to pay the amounts.

The contention that S. 488 is modelled on the lines of 58 and 59 Vic. c. 39, s. 5 cannot hold water. S. 488 of the Code of 1898 is not a new provision enacted in 1898. The same provision was found in the Code of 1882 and the Codes of 1875 and 1872 and in Act XXV of 1861. S. 316 contained a provision corresponding to that of S. 488, cl. 1. All that has to be proved in order to give jurisdiction to a Magistrate under S. 488 is that the child is unable to maintain itself and that the father neglected or refused to maintain it, and in the case of the wife that the husband refused or neglected to maintain her. Even a grown-up child, if unable to maintain itself, is entitled to get maintenance from the father if he has the means. Vide *In re Moideen* (2) and *In the matter of W. B. Todd* (3).

The next contention urged by Mr. Mockett is that there has been no neglect to pay for the maintenance of the wife and the children. This is a question of fact and the learned Magistrate has found that the petitioner herein has neglected to maintain his wife and children. A mere offer to maintain them is not sufficient, and Mr. Mockett has admitted that nothing has been paid for the maintenance of the wife and children for at least some years. There is nothing in this contention.

The third contention raised by Mr. Mockett is that there is an order of the Probate, Divorce and Admiralty Division of the High Court in England whereby the petitioner is directed to pay his wife so much alimony per month, and it is seriously urged before me that this order is a bar to an application under S. 488 of the Criminal Procedure Code. It is admitted that the wife finds it impossible to execute the order for alimony against the petitioner who is a planter in the Mysore State. Whether the order is executable or not is immaterial for the present purpose. The section gives jurisdiction to the Magistrate to award maintenance if he is satisfied that a person has neglected or refused to maintain his wife or child. The existence is not sufficient to oust the jurisdiction

2. (1913) 25 M L J 355. 3. (1873) 5 N W P H C R 237.

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of the Magistrate for a mere order for maintenance is not equivalent to maintaining the wife ; and the order, whatever may be its force or nature, cannot take away the Magistrate's jurisdiction so long as the husband neglects or refuses to maintain the wife.

Reliance was placed upon *Craxton* v. *Craxton* (4) where Bargrane Deane, J. observed : " There can be no desertion in law when a suit is pending once the Divorce Court has seized with the matrimonial suit. Justices have no right to interfere in the matter........Here the President had actually made an order, how then can the Justices claim to overrule it." In that case an order for alimony had been made by the President of the Probate Division and the Justices could not therefore pass an order under the Summary Jurisdiction Act. That case has no application to the present, for the proceedings in the Probate Division do not control the jurisdiction of a Magistrate in India.

As I have already observed, if it is proved to the satisfaction of the Magistrate under S. 488 that the husband has neglected to maintain his wife, the Magistrate has jurisdiction to order the husband to pay for the maintenance of his wife. In this case the order for alimony is unexecutable. Even if held to be executable, I am of opinion that so long as the husband does not maintain the wife either by payment of alimony or otherwise, the Magistrate's jurisdiction to order him to pay maintenance is not taken away.

The case in *Subbaramakkamma* (5) does not help the petitioner. In that case a decree for monthly allowance or maintenance had been obtained in the High Court and that decree was in force and the wife could not get a further and separate order for maintenance from the Magistrate. The case would be different if the execution of the decree for maintenance had become barred or had become unexecutable. This was distinctly held so far back as 1872. In a case *John Meiselback* (6) a Bench consisting of Sir Richard Couch, C. J. and Ainslie, J., held that a decision of the Civil Court refusing to enforce a contract or agreement against a sum for the maintenance of a woman cannot conclude either the woman from applying or a Magistrate from making an order under S. 316 of the Criminal Procedure Code for the maintenance

4. 71 Justice of the Peace 399. 5. 11 Weir 615. 6. (1872) 17 W R(Cr.) 49.

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of their illegitimate daughter. The learned Chief Justice observed : "The proceeding in the Civil Court was of a different nature. It was founded on an alleged contract, and the decision of the Civil Court even if it had not proceeded as it appears to have done on the Law of Limitation would not have concluded the woman from applying under S. 316 of the Criminal Procedure Code for the maintenance of the illegitimate daughter.........The only question in this case is whether the matter was so put before the Magistrate that he had jurisdiction to make the order under S. 316 for the maintenance of the illegitimate daughter. She stated in her petition that both she and the daughter were starving and required maintenance, and she asked for a sum to be paid for maintenance. The Magistrate had power to make an order for the maintenance of the daughter." Under S. 316 of Act XXV of 1861 (now S. 488) the only questions were whether the child was a child of the man and whether he had neglected to maintain the child ; and on these facts being found the Magistrate had jurisdiction to pass an order even though there was a previous contract between the man and the woman for payment of maintenance.

Considering the position of the parties, the order for payment of Rs. 100 to each of the person's wife and two children is eminently a just order. I dismiss the petition with costs of the counter-petitioner.

Counsel's fee is Rs. 100.

Memorandum of costs will follow.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE KRISHNAN.

Salakshi Ammal ... *Appellant** (*Plaintiff*)

v.

Doraimanikka Nadan and others ...*Respondents* (*Defendants* 1 *to* 5).

Salakshi Ammal v Doraimanikka Nadan.

Hindu Law—Will—Construction—Trusteeship—Bequest of, to members of joint Hindu family—Legatees take as joint tenants or as tenants in common.

By his will a Hindu created a charitable trust. Under the will he made his two sons, who were the only other members of the joint family of himself and his sons, the trustees of the trust. The material portion of the will so far as it related to the trust properties was as follows —

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*Appeal No. 324 of 1923. 5th March, 1925.

Salakshi Ammal v. Doraimanikka Nadan.

"The lands mentioned herein as relating to the said charities should not in any way be alienated by the abovementioned two persons or their heirs by means of sale, *otti,* hypothecation, security, partition, etc., but they should enjoy them hereditarily and conduct the abovementioned charities."

Held that, on the true construction of the will, the right of trusteeship was vested in the two sons of the testator as joint tenants with benefit of survivorship and not as tenants in common.

The current of authority in Madras is to the effect that, in the case of a gift by a Hindu father, who has sons who are members of a joint Hindu family, the presumption is that the property is taken by the sons jointly with benefit of survivorship. The presumption will be all the greater in the case of the office of trustee as trustees are ordinarily to be treated as joint tenants.

Appeal against the decree of the Court of the Subordinate Judge of Tanjore in O. S. No. 78 of 1922.

T. M. Krishnaswami Aiyar for appellant.

A. Krishnaswami Aiyar and *P. S. Chandrasekhara Aiyar* for respondents.

The Court delivered the following

Kumaraswami Sastri, J.

JUDGMENTS :—*Kumaraswami Sastri, J.* :—This appeal arises out of a suit which relates to the trusteeship of a charity founded under the will of one Sappanimuthu Nadan who died leaving two sons. The material portion of the will so far as it relates to the trust properties runs as follows :—

"The lands mentioned herein as relating to the said charities should not in any way be alienated by the abovementioned two persons or their heirs by means of sale, *otti,* hypothecation, security, partition, etc., but they should enjoy them hereditarily and conduct the abovementioned charities."

After the death of the testator his two sons were conducting the charities. One of the sons died leaving a minor son who died leaving the plaintiff, his mother as his heir. This suit is filed by the plaintiff who was the widow of one of the deceased sons and whose right is as mother of her son for a declaration that she is jointly entitled as trustee to conduct the management of these properties.

The defence is that on the death of her son the 1st defendant, who was the only male member of the undivided family, was entitled to the office and that plaintiff has no right to succession.

The Subordinate Judge dismissed the suit on the preliminary ground that the plaintiff had no right as the office was a joint office and that the 1st defendant was entitled on the death of his brother and brother's son. After the testator's death there was a partition deed executed between the two sons which it is necessary to consider before dealing with the

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contentions raised. This deed refers to properties which they got under the will and so far as the trust properties are concerned the only reference to them is in cl. 6 which runs as follows :—

"In respect of the properties mentioned in the D Schedule we shall act in common as stated in the will."

The question is, having regard to the terms of the will, whether the two sons of the testator took the trusteeship and the management as members of a joint family or whether each of them took separate interests in it as tenant-in-common. So far as gifts by a father of self-acquired property to his sons by will are concerned, the decisions of this Court are to the effect that in the absence of a contrary intention expressed or implied from the terms of the will the sons must be presumed to take the property as joint tenants. The reason is that in the case of a grant to two persons who form members of a joint family the ordinary presumption is that the grant to them is as co-parceners. I may refer to *Nagalingam Pillai* v. *Ramachandra Tevar* (1), *Ethirajulu Naidu* v. *Mukundu Naidu* (2), *Venkataramiah Pantulu* v. *Subramaniam Pillai* (3), *Indoji Jithaji* v. *Kothapalli Ramacharlu* (4) and *Rajah of Ramnad* v. *Sundara Pandiaswami Tevar* (5). There is no doubt a conflict of authority between the various High Courts on this question. The view taken in Allahabad and in Bombay is that, where property is given to persons without stating what interest they are to take, they are to take as tenants-in-common. This question as to the presumption to be raised in cases of gifts by a father to his sons recently came before the Privy Council in the case of *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh* (6) and their Lordships state the rulings of the various High Courts. As regards Madras authorities this is what their Lordships say: "In Madras upon the whole the view seems to be that the father can determine whether the property which he has so bequeathed shall be ancestral or self-acquired on the principle of *huges es dasi huges es disponeri* and that unless there is an expression of his wish that it should be deemed self-acquired, it is ancestral." The Privy Council summarised the Madras decision as stating that, where the father does not state that the sons shall take

1. (1901) I L R 24 M 429.
2. (1905) I L R 28 M 363.
3. (1912) 16 M L T 489.
4. (1919) 10 L W 498.
5. (1914) 27 M L J 694 at 716.
6. (1923) I L R 45 A 596 (P C).

the property as if it was self-acquired property of the sons, it is to be deemed to be ancestral in their hands ; or, in other words, that, unless a tenancy-in-common can be inferred from the grant, the presumption is that they are joint tenants. I do not think that on this state of the authorities I can go behind the decisions though my attention has been drawn to a recent decision in O. S. No. 56 of 1922 where Mr. Justice Ramesam seems to doubt the correctness of *Nagalingam Pillai* v. *Ramachandra Tevar* (1). It was an *obiter dictum* so far as Madras is concerned the question can be set at rest except by a decision of the Privy Council. The question is how far the doctrine in these cases which relates to property bequeathed by a father to his sons would apply to cases where the father creates a trust and appoint his sons as trustees with hereditary rights. On principle I can see very little difference between the conferring of the office of trustee as regards a trust founded by the father by dedication of properties and the gift of properties to the sons. No authority has been cited which creates a difference merely by reason of the difference in the powers of the donees. In the case of properties given to them absolutely, of course they will have full powers of alienation ; in the case of a trust they would have such powers as the law gives the trustee. The nature of the estate taken either in property or in the trust must in my opinion be the same. And I may also say that in the case of a trust the leaning of English authorities is in favour of joint tenancy. Trustees are treated as joint tenants with rights of survivorship. This is the principle enunciated in the Trust Act. So far as the present will is concerned, reading the will as a whole, I find there is nothing to show that that testator intended his sons to take the office of trustee as tenants-in-common. On the contrary, the words in the will that they should not partition, or sell the properties but they should enjoy them hereditarily suggest that he wanted them to take them with all the incidents of joint family property.

As regards the partition it seems to me that the two brothers when they divided did not intend to divide the office ; they expressly leave the office to be controlled by the will and, if they wanted to divide the office to the extent to which the law allows a division, they would certainly have fixed some turns of management, each brother managing it by turns. The question as to what the rights and liabilities of the brothers or

1. (1901) I L R 24 M 429.

Salakshi Ammal v. Doraimanikka Nadan

Kumaraswami Sastri, J.

their heirs would have been had there been such a division of management is not free from difficulty. But it is unnecessary for us to go into the question, because in the present case there has not been such a division and we are to look to the will to see what their rights are. Returning to the will, they take the right to management as joint tenants. There has been no partition between the brothers of this office nor is there any suggestion in the pleadings that after the death of one of the brothers there has been such a severance either by conduct or otherwise between the widow and the 1st defendant, the surviving brother. It is therefore unnecessary to go into the question whether *Minakshi Achi* v. *Somasundaram Pillai* (7), which has been referred to by Mr. T. M. Krishnaswami Aiyar rightly lays down the law if there was a partition. As there has been no partition of the office and as the 1st defendant is the sole surviving male member of the family, I think the plaintiff has no right to manage the property along with the 1st defendant. The right survives to him alone. In the view I take the learned Subordinate Judge was right in dismissing the suit. The appeal fails and is dismissed with costs.

Krishnan, J.

Krishnan, J. :—This appeal refers to a charitable trust founded by one Sappanimuthu Nadar. The trust has been created by a will which has been filed in the case as Ex. A. Under that will he made his two sons who were the only other members of the joint family of himself and his sons the trustee of the trust. The words " creating the trust " are cited in the judgment of my learned brother just now delivered and I need not refer to that again. There is an express provision there that the properties are not to be alienated or even partitioned but that the two brothers were to take the properties jointly and enjoy them jointly and carry out the provisions of the trust which are set out. Subsequent to the death of Sappanimuthu Nadar there was a partition between the two brothers, and that partition is evidenced by Ex. B which has also been filed in the case. One of the brothers Kandaswami Nadar died subsequently leaving a minor son called Rajappa Nadar. He also died and the plaintiff Salakshi Ammal who is his mother and the widow of Kandaswami Nadar succeeded to a woman's estate in the properties which had fallen to the share of Kandaswami. She has brought this suit to have it declared that she was entitled jointly with the 1st defendant, the surviving bro-

7. (1920) I L R 44 M 205 : 39 M L J 403.

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ther, to manage this trust estate. The Subordinate Judge before whom the case came on for hearing had dismissed the suit without taking any evidence except the two documents already referred to, Exs. A and B. He has held that the 1st defendant is the sole surviving trustee now and that the plaintiff has no right to manage the trust. The plaintiff has appealed to us.

It has been argued before us very strenuously by Mr. T. M. Krishnaswami Aiyar that this decision is erroneous, that the right of trusteeship was vested in the brothers as tenants-in-common and that on the death of one of the brothers his right passed to his heirs, first to his son and then to that son's mother, the plaintiff. It is that question we have to consider in this appeal.

The partition deed, Ex. B, which has been referred to, has really no bearing on the case ; because, when partitioning the family properties between the two brothers by Ex. B, they expressly reserved the trust properties from the partition, for they say in para. 6 " in respect of the charity properties mentioned in the D schedule, (that is the charity properties dealt with in the will), we shall act in common as stated in the will." So that, as far as the partition deed was concerned, the arrangement in the will was left intact although the parties divided their family estate otherwise. For the disposal of this case therefore we have only to look to the will and see what arrangement has been made under the will for the purpose of carrying on the trust after the death of one of the persons named in the trust. The question therefore whether *Minakshi Achi* v. *Somasundaram Pillai* (7) is rightly decided or not is not before us at all. It would have been before us if the two brothers had attempted by their partition deed to divide the trust office or made some arrangement regarding it between themselves. Such a thing not having been done, we need not consider the question as to whether a trust office is partible at all between the trustees. Turning now to the wording of the will, it seems to me quite clear that on the words of the will the two brothers were constituted trustees of this charity as joint tenants and not as tenants-in-common as argued by Mr. T. M. Krishnaswami Aiyar. The ordinary presumption as regards trustees is that they are joint tenants ; for, both under the English Law and under S. 44 of the Indian

7. (1920) I L R 44 M 205 : 39 M L J 403.

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Trusts Act, on the death of one trustee all the rights of the trustees rest in the surviving trustees. As pointed out by my learned brother, the cases that he has referred to show that in Madras the view is taken that, when a father makes a gift of or bequeaths self-acquired property of his to his children who are members of a joint family, the ordinary presumption is that they take that property as joint tenants and not as tenants-in-common. It was suggested that this view was not a correct view but it has been followed in so many cases that until the Privy Council decide to the contrary I am inclined to think that we should follow that view. It is true that Mr. Justice Ramesam has expressed a doubt about the correctness of the ruling in *Nagalingam Pillai* v. *Ramachandra Tevar* (1) in his judgment in O. S. A. No. 56 of 1922 but that is not a sufficient basis for us to refer the question to a Full Bench as after all that doubt is expressed as an *obiter dictum*. Assuming them that, in the case of a gift by a Hindu father, who has sons who are members of a joint family, the presumption will be that the property is taken by the sons jointly. The presumption will be all the greater in the case of trust property as trustees are ordinarily to be treated as joint tenants. Here in this will it is clear that the author of the trust, the father, intended that the charity property should be kept intact and be enjoyed jointly by the trustees and their heirs. In these circumstances there is no difficulty in holding that the rule of succession as regards joint property in a Hindu family must apply, and that when one trustee dies the members of the joint family will take the trusteeship according to the law of survivorship. That will exclude the claim put forward by the plaintiff who is only a female member of the joint family. I therefore agree with my learned brother in thinking that the Subordinate Judge was right in the view he has taken of this case and that the plaintiff's appeal fails and must be dismissed with costs.

A. S. V. *Appeal dismissed.*

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1. (1901) I L R 24 M 429.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Rama Raja Thevar ... *Appellant** (*3rd defendant*)

v.

Papammal and another ... *Respondents* (*Plaintiff and 2nd defendant*).

Rama Raja Thevar v. Papammal.

Hindu Law—Maintenance—Concubine—Maintenance from family property of deceased paramour—Right of—Conditions.

A permanent concubine, who remains chaste, is entitled to maintenance from the family property of her deceased paramour. The rule in favour of the maintenance of concubines is not confined to cases where there are not other heirs and the property would otherwise escheat to the Sovereign.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura in O. S. No. 30 of 1918.

C. S. Venkatachariar and *S. Sundararaja Aiyangar* for appellant.

T. R. Ramachandra Aiyar, B. Sitarama Rao and *S. R. Muthuswami Aiyar* for respondents.

Spencer, J.

The Court delivered the following

JUDGMENTS :—*Spencer, J.* :—The plaintiff was the permanent mistress of Muthu Doraiswami Thevar, who was in receipt of Rs. 700 per mensem as a rent charge on the estate of the Rajah of Ramnad. This sum of Rs. 700 has been erroneously described in various places as an annuity, perhaps for the reason that the liability to pay it accrues annually, but it is not strictly an annuity as it is not for the duration of any one life, but is a charge on the revenues of the estate of the Rajah of Ramnad in perpetuity. The right to the rent charge was established as against the Rajah of Ramnad in a suit brought by Ramamani Ammal, the mother of Muthu Doraiswami Thevar, which went up to the Privy Council. [Vide *Rajah of Ramnad* v. *Sundara Pandiyasami Thevar* (1)]. The right has been mortgaged to a Chetty who is not a party to the present suit. The plaintiff claimed in this suit maintenance against the 1st defendant who was the assignee from a reversioner of Muthu Doraiswami Thevar's estate, and the 1st defendant having died during suit, the claim was continued against his son, the 3rd defendant. After Muthu Doraiswami Thevar's death, the

*Appeal No. 128 of 1922. 3rd February, 1925.

1. (1918) I L R 42 M 581 : 36 M L J 164 (P C).

plaintiff was responsible for other litigation before the present suit. There was a suit under the Specific Relief Act for possession of the bungalow in which she lives, and another suit for a declaration that she was a landlord in respect of certain villages which were in the possession of the deceased Muthu Doraiswami Thevar. In the first suit she succeeded but she lost the second suit based on the footing that she was the wife and heir of Muthu Doraiswami Thevar.

Two questions have been argued in this appeal. Firstly, whether a concubine is entitled to maintenance against the estate of the man who kept her, and secondly, whether the rate of maintenance of Rs. 100 per mensem (with 12 years' past maintenance) is a fair rate and one to which the plaintiff is entitled.

On the point of law as to the right of a permanent concubine for maintenance from the family property of her deceased paramour the leading decision in this Court is *Panchapagesa Odayar* v. *Kanaka Ammal* (2). But there are a number of decisions in the Bombay High Court, viz., *Khemkor* v. *Umiashankar* (3); *Vrandavandas Ramdas* v. *Yamunabai* (4); *Yashavantrav* v. *Kashibai* (5); and *Bai Monghibai* v. *Bai Nagubai* (6).

After hearing arguments on both sides, I see no reason why we should not follow the decision in *Panchapagesa Odayar* v. *Kanaka Ammal* (2). The basis of the right of a concubine to be maintained is the text of *Mitakshara,* Chapter II, S. 1, placita 27 and 28. In these placita Vignaneswara refers to the texts of Katyayana and Narada and he states the word "Stree" includes a concubine. It is true that the purpose with which the definition was made in this passage was in order to show that a wife was entitled to succeed to her husband's property but it is nevertheless established that the word "woman" includes concubines in the ancient texts. The Courts have placed from time to time several limitations, conditions on the right of concubines to be maintained. In *Bai Monghibai* v. *Bai Nagubai* (6) it was made clear that the rule was not applicable to every kept woman but only to those who are continuously and exclusively kept in a man's family and are, in other words, what is known as "Avaruddha Stree" in Sanskrit.

2. (1917) 33 M L J 455. 3. (1873) 10 Bom H C R 381.

4. (1875) 12 Bom H C R 229. 5. (1887) I L R 12 B 26.

6. (1922) I L R 47 B 401.

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Another condition that has been put on the right of a concubine to be maintained is, that she should be the mother of illegitimate children [see *Khemkor* v. *Umiashankar* (3) and Strange's *Hindu Law,* Chap. VIII, p. 174]. Another is that she should be chaste and keep undefiled the bed of her lord and master. [See *Yashavantrav* v. *Kashibai* (5) and *Anandilal Bhagchand* v. *Chandra Bai* (7)]. In these two latter respects, it cannot be suggested that the plaintiff has lost her right to maintenance. She gave birth to a daughter when she was being kept by the deceased Muthu Doraiswami Thevar, and it is not now suggested that she has had anything to do with other men. It has been argued by Mr. Venkatachariar that the rule in favour of the maintenance of concubines only applies to cases where there are no other heirs and the property would otherwise escheat to the Sovereign as those are the circumstances spoken of in the text of Katyayana. The argument that the rule is only applicable to cases of escheat was advanced before Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar, and in *Panchapagesa Odayar* v. *Kanaka Ammal* (2) they rejected any attempt to put such a restrictive interpretation on the texts. It has also been brought to our notice that in the Saraswathi Vilasa there is no restriction of the rule to cases of escheat only. In *Ramanarasu* v. *Buchamma* (8) it was held that a discarded concubine was not entitled to claim maintenance. This only amounts to saying that a man is not bound by law to keep a concubine when he does not want her, and so long as he is alive, he can put an end to the relationship between himself and a kept woman. If he dies without putting an end to the relationship, the presumption is that he intended the concubinage to be permanent, and as the learned Judges observed, there is a moral obligation on the part of the man's heirs to see that his concubine should not be left destitute after his death, and it has been imposed as a conditional liability upon those who succeed to his property. The question is not really so much one of the legal relationship between a man and a woman as of equity that a woman who has been kept for a number of years and given a position almost equal to that of a wife should not be left to starve after the death of the man who kept her. Thus it is a matter not of a contract during the lifetime of the parties but of obligations

2. (1917) 33 M L J 455. 3. (1873) 10 Bom H C R 381.
5. (1887) I L R 12 B 26. 7. (1923) I L R 48 B 203.
8. (1899) I L R 23 M 282 : 10 M L J 62.

arising out of the personal law of Hindus as defined by their religious texts. For these reasons I am of opinion that the Lower Court's judgment allowing maintenance to the plaintiff can be maintained.

As for the rate of maintenance, the Lower Court fixed it at Rs. 100 a month, although the claim was for Rs. 150. The plaintiff was also given a right to reside in the bungalow where Muthu Doraiswami Thevar was living. It appears that there are two bungalows and that she has been given a right of residence in the larger bungalow. It is suggested that the maintenance of Rs. 100 might be reduced on the ground that the plaintiff was letting out a portion of this bungalow which was more than sufficient for her use, and deriving a rent therefrom of Rs. 15 a month. That was only for a time when the bungalow was in good repair. As she is living as a single woman and has got her daughter married, the accommodation of the smaller bungalow would probably be sufficient for her, but, as a matter of sentiment, she has been allowed to occupy the larger bungalow. I am of opinion that if she would give up her present residence to the appellant and occupy the smaller bungalow in which he now lives, there would be no reason to decrease her allowance of Rs. 100 per mensem, but if she persists in living in the larger bungalow and occupying the whole of it, the allowance of Rs. 100 per mensem when she has a free right of residence besides is rather excessive and the rate of maintenance should be reduced to Rs. 85 per mensem, provided that the 3rd defendant keeps the bungalow in proper repair, and it is stated to be in bad repair now. The plaintiff is willing to repair the big bungalow at her own cost if she is allowed to remain in it and to continue to receive Rs. 100 per mensem. The 3rd defendant will be given three months' time from now to put it in complete repair and if he does so, the rate of maintenance will be reduced to Rs. 85 per mensem.

Muthu Doraiswami Thevar died in 1905. The Lower Court has allowed 12 years' past maintenance at the same rate of Rs. 100 till 1912. From July, 1907, the plaintiff was in possession of four villages mentioned in the plaint and she has not accounted for her profits by showing how much was spent on the chattram. Periaswami Thevar, whose son married the plaintiff's daughter and managed the four chattrams villages, admits in Ex. Q that the chattram was never in his

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management and he did not pay any quit-rent to the Rajah. The plaintiff has not accounted for the income of those villages during those five years. Under these circumstances, I am of opinion that she is not entitled to more than seven years' past maintenance and the decree will be modified accordingly, maintaining the rate of Rs. 100. In the plaint the plaintiff asked that she should be given a charge for her maintenance either on the allowance payable by the Rajah of Ramnad to the 3rd defendant or on the four chattram villages. The Subordinate Judge directed that the amounts awarded by him should be a charge on the plaint-mentioned villages and on the annuity (*sic*) payable by the second defendant. On Issue 7 he found that the plaintiff was entitled to this charge as the defendants had not placed before the Court any materials for determining what income was required for the charity. There is no finding whether these villages were burdened with the trust or whether the whole income has been dedicated to charity. *Prima facie* the villages themselves cannot be made the subject of this charge, as they are trust properties or burdened with a trust. Unless and until it is found in a regular suit instituted by some one interested in the trust that the whole income is devoted to charity, the decree in the present suit must provide that the maintenance should be a charge on the surplus funds, if any, derived from these villages, and the Lower Court's decree must be amended in so far as it created a charge on the villages themselves.

The Lower Court has further granted a personal decree against the 3rd defendant to pay maintenance. It is not contended that he is personally liable. The decree must, therefore, be amended by directing him to pay out of the assets of Muthu Doraiswami Thevar in his hands and by charging the amounts payable as above stated, viz., Rs. 50 on the annual rent charge as agreed to in the compromise in Sigappa Achi's suit, O. S. No. 5 of 1921, and the remainder on the surplus, if any, of the income from the villages after performing the charities.

The Lower Court's decree, subject to these modifications, is confirmed. The plaintiff will get proportionate costs throughout and she will be liable for the Court-fees due to Government.

Ramesam, J.

Ramesam, J. :—I agree. The expression "Avaruddha Stree" was used by Vignaneswara not only in *Mitakshara*,

Chapter II, S. 1, placitum 28 and in Chapter I, S. 8, placitum 22, but also explained in the commentary on verse 290 of Vyavahara Adhyaya of Yagnavalkya. So long as a woman satisfies this interpretation of the term "Avaruddha Stree" [vide *Bai Monghibai* v. *Bai Nagubai* (6)] and satisfies the condition that she remains chaste [*Anandilal Bhagchand* v. *Chandra Bai* (7)] I do not see any reason why she should be deprived of her maintenance.

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I agree with the order proposed by my learned brother.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Meruva Parasuramudu ... *Petitioner** (*Plaintiff*)

v.

Mandavilli Ramanna ... *Respondent* (*Defendant*).

Parasuramudu v. Ramanna.

Civil Procedure Code, O. 44, R. 1, proviso—Leave to appeal in forma pauperis—*Application for—Hearing of—Respondent not served with notice—Right to appear and oppose—Grounds for granting leave to appeal—R. 1, proviso—Effect.*

At the hearing of an application for leave to appeal *in forma pauperis,* the respondent, on whom notice has not been served, has no *locus standi* to appear and to require to be heard against the application.

The terms of the proviso to R. 1 of O. 44, Civil Procedure Code, cannot be read as indicating that before leave is granted the Court must go through the whole case and admit the appeal only if it is satisfied that it would reverse the judgment below there and then if no appearance was entered for the respondent. All that the proviso requires is that before admitting a pauper appeal the Court should be satisfied that it is not merely a frivolous appeal and that there are reasonable grounds for doubting the correctness or justness of the decision below.

Petition under O. 44, R. 1 of Act V of 1908, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to grant leave to the petitioner to appeal *in forma pauperis* against the decree of the Court of the Additional Subordinate Judge of Cocanada in O. S. No. 19 of 1924 (O. S. No. 84 of 1922 on the file of the Court of the Subordinate Judge of Cocanada).

G. Lakshmanna for petitioner.

P. Somasundaram and *P. Satyanarayana Rao* for respondent.

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*C M P No. 4419 of 1924. 7th January, 1925.

6. (1922) I L R 47 B 401. 7. (1923) I L R 48 B 203.

Pitta-ramudu v. Ramanna.

The Court made the following

ORDER :—I think this is a case in which leave to appeal should be granted under the provisions of O. 44 of the Procedure Code. Mr. P. Somasundaram appeared without any notice on behalf of the respondent in the appeal and wished to be heard on the question whether, having regard to the terms of the proviso to R. 1 of that order there is such a case made out for the appellant as would justify me in saying that the judgment and decree of the Lower Court are erroneous or unjust. I am not satisfied that he has got any *locus standi* to appear at this stage and require to be heard, but I have nevertheless heard him, and even after hearing him I am not at all satisfied that the requirements of the proviso are not satisfied in this particular case. I cannot possibly read the terms of the proviso as indicating that I must go through the whole case and admit the appeal only if I am satisfied that I would reverse it there and then if no appearance was entered for the respondent. I take the terms in the proviso merely to indicate that the Court before admitting such a pauper appeal should be satisfied that it is not merely a frivolous appeal and that there are reasonable grounds for doubting the correctness or justness of the decision of the Lower Court. In that view I consider that there is a great deal to be said with regard to the correctness of the decision of the Lower Court and I therefore order that the appeal should be dismissed.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Srambikkal Maliakkal Moideen Koya and another ... *Petitioners** (*Defendants*)

v.

Kattuparambath Moideen Kutti Haji and another ... *Respondents* (*Plaintiffs*).

Moideen Koya v. Moideen Kutti Haji.

Civil Procedure Code, O. 20, R. 4 (1)—Small Cause Court—Judgment—Number of issues raised—Judgment merely stating all issues found for plaintiffs—If sufficient.

In a Small Cause suit, the judgment set out a number of issues as arising in the case, and then merely stated, "I find all the issues for the plaintiff."

*C. R. P. No. 426 of 1925. 14th April, 1925.

Moideen Koya v. Moideen Kutti Haji.

Held, it was not a sufficient compliance with the provisions of O. 20, R. 4 (1), Civil Procedure Code.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Principal District Munsif of Calicut in S. C. S. No. 408 of 1922.

K. P. Ramakrishna Aiyar for petitioners.

T. S. Viswanatha Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The judgment of the Lower Court in this Small Cause case is an extremely unsatisfactory one. The learned District Munsif says that he finds all the issues for the plaintiffs. My attention has been drawn to the terms of O. 20, R. 4 and the decision of this Court reported in *K. M. Koppa Kurup v. Velayichettichiar* (1). In that case Spencer and Krishnan, JJ. laid down that it was enough for a Small Cause Judge to follow the provisions of O. 20, R. 4, cl. (1), and the learned Judges further proceeded to observe that they are unable to follow the line taken by Seshagiri Aiyar, J. in *Kandaswami Chetti* v. *Ramalinga Chetti* (2). I should have been disinclined to interfere in this case if at any rate the District Munsif had, while setting out the points for determination according to him, at least stated his decision with regard to each separately. But when I find that he has clubbed them all together and made a statement merely to the effect that he finds all the issues in favour of the plaintiffs, I cannot regard it as a compliance even with the provisions of O. 20, R. 4. Taking one of the points for determination, namely, "Did the defendant commit breach of contract as alleged by the plaintiffs," and taking the words of the District Munsif, the finding should be deemed to be that the defendants did commit breach of contract. It is not at all clear how the District Munsif found that the breach came to be committed by the defendants. This was not a case in which any time was fixed for the performance of the contract and the defendant, in his written statement, set out that he was not only ready and willing to deliver to the plaintiffs the balance of the cocoanuts but that the plaintiffs refused to accept delivery of the same. No doubt if the defendant was bound to perform the contract within a reasonable time and failed to do so he would have been guilty of breach of contract. But that

1. (1922) 42 M L J 583. 2. (1920) 12 L W 285.

Moideen Koya v. Moideen Kutti Haji.

would undoubtedly be a point for determination and I see no indication whatever in the judgment that the attention of the learned District Munsif was at all drawn to this feature of the case or that he came to any conclusion or decision with regard thereto. On the whole, I am satisfied that the judgment before me does not comply with the provisions of law and is also otherwise very unsatisfactory. I, therefore, set it aside and direct that the case be remanded to the Lower Court for being disposed of according to law. If the parties desire they would be at liberty to adduce such evidence or fresh evidence as may be deemed fit. Costs in this Court will be reserved and be dealt with and disposed of by the Lower Court as part of its order for costs.

T. S. V. *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

Ramachandra Servai ... *Petitioner* * (*Cr. Petitioner in M. C. No.* 13 *of* 1924 *on the file of the Sub-divisional 1st class Magistrate of Devakottai*)

v.

President, Union Board, Karaikudi ... *Respondent* (*Ptr. in do.*)

Ramachandra Servai v. President, Union Board, Karaikudi.

Madras Local Boards Act (XIV of 1920), S. 221—Proceedings before Magistrate under, to recover penalty imposed for encroachment—Plea of defaulter of no encroachment at all—Maintainability.

Where a Local Board moves a Magistrate under S. 221 of the Madras Local Boards Act (XIV of 1920) to recover a penalty imposed for encroachment, the defaulting party cannot ventilate before the Magistrate his claim that there was no encroachment at all, and cannot plead such a defence to the case.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order dated 30th June, 1924 in M. C. No. 13 of 1924 on the file of the Court of the Sub-divisional 1st class Magistrate of Devakottai.

Dr. Swaminathan for *K. K. Ranganatha Aiyar* for petitioner.

The Public Prosecutor on behalf of the Crown.

S. Ranganatha Aiyar for respondent.

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*Cr R C No. 614 of 1924
(Cr R P No. 514 of 1924). 30th March, 1925.

Rama-chandra Servai v. President, Union Board, Karaikudi.

The Court made the following

ORDER :—The question for decision in this case is whether, when a Local Board moves a Magistrate under S. 221 of the Madras Local Boards Act (XIV of 1920) to recover a penalty imposed for encroachment, the defaulting party can ventilate before the Magistrate his claim that there was no encroachment at all, and plead such a defence to the case.

It is obvious that, if petitioner's contention be sound that he is allowed to plead such a defence, the Magistrate is constituted a sort of appellate authority over the Local Board in the matter of deciding whether or not there has been in fact an encroachment ; and a wholesale application of such a principle would mean that in all cases of demand by the Local Board for fees, tolls, costs, compensation, damages, penalties, charges, expenses or other sums due to it the Magistrate, a Judge appointed for the trial of criminal matters, is set up as the final Judge over the Local Board, except in so far as either party may take the matter before a Civil Court.

This is to our mind a startling proposition, and, unless the wording of the section clearly imports it, we do not accept it. Clause (1) of the section clearly lays down that what has to be ascertained by the Magistrate is the " amount or apportionment of the sum. " If that is disputed and that, we take it, is the question that has to be determined under clause (3). Here petitioner is not disputing as to the amount due or its apportionment. He contends that the penalty is not leviable at all. We therefore see no support for the petitioner in the wording of the section.

Under S. 164 the petitioner is "bound" to pay such sums as may be demanded by the Local Board by way of penalty, which sum " may be recovered in the manner hereinafter provided, " *i. e.*, as in S. 221. This makes it quite clear that S. 221 only applies to the manner of recovery and does not re-open the question whether the petitioner is bound to pay. Petitioner is not able to refer us to any reported case directly in support of his view. The case *In re Smith* (1) was a case of prosecution of a person who had erected some machinery without permission of the Commissioner of Madras City Municipality, and thus was said to have contravened S. 288 of the

1. (1923) 45 M L J 731.

Ramachandra Servai v. President, Union Board, Karaikudi

Madras City Municipal Act (IV of 1919). There this High Court went into the question of whether such permission was required in the case and decided that it was not. We do not think this can throw any light on the proper interpretation of Ss. 164 and 221 of the Local Boards Act. The same learned Judge has held in a case *In re Krishnaswami* (2) that, in a prosecution for contravention of S. 166 (1) of the Local Boards Act, it was not open to the accused to plead that the motor-bus license ought not to have been refused by the President of the Local Board. Another learned Judge of this Court has taken a similar view in a case *Chairman, Municipal Council, Chicacole* v. *Seetharamayya Naidu* (3), a case of disobedience of a notice under S. 219 (1) of the Madras District Municipalities Act (V of 1920).

We find no support for the petitioner's contention in these cases or any others cited before us. We dismiss this petition.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Muthukaruppa Muthirian and others ... *Appellants* (Plaintiffs 1 and 3 to 5)*

v.

Sivabhagyathammal and others ... *Respondents (Defendants 1 to 4).*

Muthukaruppa Muthirian v. Sivabhagyathammal.

Hindu Law—Will—Construction—Bequest to wife and daughter jointly—Intention—Question of fact—Interference in second appeal—Joint tenancy—If unknown to Hindu Law.

A Hindu by his will left some property to his senior wife and her daughter jointly, to his junior wife separately, and provision was made for the joint payment of debts by the mother and daughter. The Lower Appellate Court on considering all the circumstances came to the conclusion that the testator intended to create a joint estate in the mother and daughter with rights of survivorship. *Held,* the question of intention was one of fact and so long as no inferences contrary to law are drawn, cannot be interfered with in second appeal.

The dictum of the Judicial Committee in *Jogeswar Narain Deo* v. *Ram Chandra Dutt,* I L R 23 C 670 (P C) that "the principle of joint tenancy appears to be unknown to the Hindu Law except in the case of a co-parcenary between members of an undivided family," treated as a broad statement of law is not strictly accurate.

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*S A Nos. 1489 and 1490 of 1922. 15th April, 1925.

2. (1924) 48 M L J 132.

3. (1924) 21 L W 280.

Muthu-karuppa Muthirian v. Sivabhagyathammal.

Second Appeals against the decrees of the District Court of Trichinopoly in A. S. Nos. 229 and 211 of 1921 preferred against the decree of the Court of the Subordinate Judge of Trichinopoly in O. S. No. 108 of 1918.

N. Rajagopalachari for appellant.

K. G. Srinivasa Aiyar for respondent.

The Court delivered the following

JUDGMENT:—*In S. A. No.* 1489 *of* 1922:—The question at issue in this appeal is the construction of the will of one Vythi Muthirian whereby he left his property to his senior wife and her daughter and to his junior wife, the first two being bequeathed a larger portion of the property than the latter. The question now is whether the senior wife and her daughter took the property as joint tenants or as tenants-in-common, the plea that they only took a life-estate not being seriously pressed before me.

The District Judge has considered the language of the will and the circumstances in which it was executed and has come to the conclusion that the bequest was to the wife and daughter as joint tenants. It is now contended for the appellants that this finding cannot be sustained as it is opposed to the decision of the Privy Council in *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (1). In that case, in which there was a will of a somewhat similar nature, it was held that the legatees, mother and son, to whom a joint bequest was made, took the property as tenants-in-common and not as joint tenants. I may here point out that in the will under consideration in that case there were words of inheritance used after the bequest and there were no special circumstances to guide the Court in arriving at the intention of the testator. A case of this Court reported in *Vydinada* v. *Nagammal* (2) was overruled. In that case the bequest to a nephew and to his wife was held to constitute a joint tenancy. The Judicial Committee overruled that decision on the ground that this High Court was not justified in importing into the construction of a Hindu will an extremely technical rule of English conveyancing and also on the ground that under the English Law a conveyance by one joint tenant operates as a severance. In addition there is a dictum of their Lordships upon which the appellants now rely and that is, "the principle of joint tenancy appears to be unknown to the Hindu Law except in the case of a co-parcenary

1. (1896) I L R 23 C 670: 6 M L J 75 (P C).

2. (1888) I L R 11 M 258.

Muthukaruppa Muthiriar v. Sivabhagyathammal

between members of an undivided family." If that were a strictly accurate statement of Hindu Law and treated as an invariable proposition of law, there would be a very strong presumption that a bequest to two persons who are not members of an undivided family would not constitute joint tenancy, and such a presumption could only be rebutted by special words creating such joint tenancy. It, however, appears that this statement treated as a broad statement of law is not strictly accurate. As is pointed out in a subsequent case *Venkayamma Garu* v. *Venkataramanayamma Bahadur Garu* (3) by their Lordships there are instances of Hindus taking property jointly who are not co-parceners of a joint Hindu family. It was there recognised that widows succeed jointly, as also daughters, and it has also been held that this is the case with daughter's sons. Joint tenancy is not therefore unknown to Hindu Law and consequently there is not the same difficulty in inferring that such an estate has been created as if such an estate were entirely unknown to Hindu Law. There is a case reported in *Narpat Singh* v. *Mahomed Ali Hussain Khan* (4) which is opposed to the decision in *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (1) and is not expressly overruled by the latter and consequently I think it must be taken that the latter is to be read solely with reference to the facts of that particular case and not as laying down a principle that no joint tenancy can ever be created by a Hindu testator without specific words to that effect. If that is conceded, as I think it must be, then the question of the testator's intention has to be considered with reference to the facts of each case. Here the learned District Judge has considered the language of the document and the fact that provision was made for one wife and her daughter apart from the second wife, for whom provision was also made, and that provision was made for the joint payment of debts by the mother and daughter, and also other considerations specified in his judgment and has come to the conclusion that the testator did intend to create a joint estate in the mother and daughter, to which the survivor would succeed. This question of intention is one of fact and so long as the Judge makes no inferences which are not justified in law, the finding of intention is one which cannot be interfered with in Second Appeal. Assuming that the testator could create a joint tenancy, the question of whether he did so by his will

1. (1896) I L R 23 C 670 : 6 M L J 75 (P C).

3. (1902) I L R 25 M 678 at 687 (P C). 4. (1884) I L R 11 C 1 (P C).

Muthu-karuppa Muthirian v. Sivabhagya-thammal.

and intended to do so is one of fact. I am not prepared to say that the District Judge's finding is wrong and accordingly the appeal must be dismissed with costs.

In S. A. No. 1490 *of* 1922 :—This case follows the connected case and is dismissed with costs.

T. S. V. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Tiruvengadam Pillai ... *Appellant** (*4th defendant*)

v.

Sabapathi Pillai (minor), by guardian Venugopala Sastri—*vide* Order, dated 24th October, 1923, on C. M. P. No. 2163 of 1923—and others ... *Respondents* (*2nd plaintiff and 1 to 3 defendants*).

Tiruvengadam Pillai v. Sabapathi Pillai.

Transfer of Property Act, S. 101—*Purchaser redeeming prior mortgage—Subrogation—Intention to keep alive—Presumption—If rebuttable—Question of fact—Second appeal.*

When a person purchasing a property discharges a prior mortgage on the same and claims subrogation in respect thereof, the Court should start with the presumption that a person paying off a mortgage intends to keep it alive if it is for his benefit to do so. This presumption is not an irrebuttable one. The question of intention is one of fact to be inferred from the circumstances of the particular case and cannot be interfered with in second appeal.

Second Appeal against the decree of the District Court of Trichinopoly in A. S. No. 131 of 1921 preferred against the decree of the Court of the Additional Subordinate Judge of Trichinopoly in O. S. No. 30 of 1920 (O. S. No. 3 of 1919 on the file of the Court of the Subordinate Judge of Trichinopoly).

A. Narasimhachariar for appellant.

K. Kuttikrishna Menon for respondents.

The Court delivered the following

JUDGMENT :—The appellant is the owner of one item of mortgage property and in purchasing that property he discharged a prior mortgage on that one item and also two other items of property, one of which is the subject-matter of the suit mortgage along with the property purchased. The question is whether the appellant is entitled to subrogation in res-

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* S. A. No. 1493 of 1922. 9th April 1925.

pect of that prior mortgage. Both the Lower Courts have found that he is not so entitled.

Objection is taken to the finding of the Lower Appellate Court on the ground that the reasons given by the learned District Judge are not relevant in coming to the conclusion as to the intention of the appellant when he discharged the prior mortgage. The District Judge has rightly kept in mind the fact that in such cases the presumption is that the person paying off a mortgage intends to keep it alive if it is for his benefit to do so—a principle which is laid down in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (1). Starting with that presumption the Judge has considered the evidence and has come to the conclusion that in the circumstances of the case that presumption is rebutted.

In appeal it is contended that he has rather addressed himself to the intention of the original mortgagor than to the intention of the appellant. I do not think that this is clearly established. There are circumstances in the case which undoubtedly weaken the presumption that he intended to keep it alive. The original mortgage was in respect of three items of property and the appellant has only purchased one of these items. The mortgage bore very heavy interest and there can be no doubt that the mortgagors intended that it should be put an end to, and there is the circumstance that this one property was sold to discharge a mortgage on three items. There is also an endorsement on the original mortgage deed that the money was actually paid to the mortgagee and the document was cancelled. The contention in appeal really seems to be that according to the authorities the presumption of law as to intention is really irrebuttable. That that is not so is clear from the decision of the Privy Council in *Mohesh Lal* v. *Mohant Bawan Das* (2) and also two cases of this Court *Kalagayya* v. *Yanadamma* (3) and *Govindaswami Tevan* v. *Doraiswami Pillai* (4). Therefore the question of intention is a question of fact. It has been laid down in several cases that certain acts, or certain facts, are not sufficient to rebut the presumption, but when we consider the intention of a person doing an act that act under one set of circumstances may show a certain intention, whereas the same act under a different set of circumstances, may show a different intention, so

1. (1884) I L R 10 C 1035 (P. C.) 2. (1883) I L R 9 C 961 (P.C.)
3. (1910) 21 M L J 180. 4. (1910) I L R 34 M 119 : 20 M L J 380.

that the inference in all cases has to be drawn from the circumstances of the cases themselves. The District Judge has chosen to consider that the several circumstances in this case are sufficient to establish what was the intention of the appellant and that is all that he is required to do, and he has evidence to go on. Consequently, this being a second appeal, I do not think that I can interfere with this finding of fact. The appeal is dismissed with costs. Time for payment is extended to three months from this date.

Tiruvengadam Pillai v. Sabapathi Pillai.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

K. V. Subramania Aiyar and others ... *Appellants* (Plaintiff's L. Rs.)*

v.

Shanmugam Chettiar and others ... *Respondents (Defendants 2 to 7 and L. R. of the 1st defendant).*

Subramania Aiyar v. Shanmugam Chettiar.

Limitation Act of 1908, Art. 177—Limitation period under—Amending Act XXVI of 1920—Effect—Period if cut down—Evidence Act, S. 78 (1)—Imperial Act—Proof of—Publication in Gazette of India*—Publication by Superintendent of Government Printing, Calcutta—Conflict between—Preference.*

The period of limitation under Art. 177 of the Limitation Act of 1908 remained at six months even after the Amending Act (Act XXVI of 1920).

Under S. 78 of the Evidence Act the publication in the *Gazette of India* is the proper method of proving an Imperial Act, and, if there is a conflict between that publication and the publication by the Superintendent of Government Printing, Calcutta, preference will certainly be given to that in the *Gazette of India.* That publication does not purport to be published by the authority of the Government of India.

Second Appeal against the decree of the District Court of West Tanjore in A. S. No. 238 of 1920 preferred against the decree of the Court of the Temporary Subordinate Judge of Tanjore in O. S. No. 52 of 1919.

T. M. Krishnaswami Aiyar and *A. V. Viswanatha Sastri* for appellants.

K. Bhashyam Aiyangar, V. C. Seshachariar, M. S. Venkatrama Aiyar and *P. S. Narayanaswami Aiyar* for respondents.

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*S A No. 1163 of 1922. 6th April, 1925.

Subramania Aiyar v. Shunmugam Chettiar.

The Court delivered the following

JUDGMENT :—In this case the 1st respondent in Appeal Suit No. 238 of 1920 on the file of the District Court of Tanjore died during the pendency of the proceedings. An application was put in within three months for bringing on record his legal representative, but that application appears to have been dismissed on the ground that batta was not paid, and it now appears that the non-payment was entirely due to the negligence of the appellant's vakil's clerk. A subsequent application was put in three and a half months after the 1st respondent died asking for the restoration of the first petition and also for bringing on record a certain lady as the 1st respondent's legal representative. That petition was dismissed on the assumption that in so far as it prayed for the addition of the legal representative it was out of time and also on the ground that there was no sufficient reason for restoring the original petition.

The main question that is now raised in Second Appeal is whether the Judge was right in considering that the second application was out of time, namely whether the period prescribed for such an application is six months, or only 90 days. The application is one under Art. 177 of the Schedule to the Limitation Act, and in the Limitation Act of 1908 the period prescribed is six months. In 1920 an amending Act was passed, and the question is whether that amending Act reduced the period of six months to 90 days, or left it at six months. The Calcutta and the Bombay High Courts are both of opinion that the period remains at six months notwithstanding this amending Act, whereas the Allahabad and Lahore High Courts are of the contrary opinion. In the case reported in *Gobind Das* v. *Rup Kishore* (1) the matter has been very carefully discussed and it was found that if the words of the amending Act (Act XXVI of 1920) were applied to the Act of 1908 as originally published in the *Gazette of India,* the period of limitation under Art. 177 would remain at six months. It appears that the other copies of the Act printed by the Superintendent of Government Printing, Calcutta, are paged differently, and in them against Art. 177 the word "Ditto" appears. The result of the amendment of Art. 176 which reduces the period of limitation to 90 days would have the effect of making Art. 177 read as having reduced the period similarly, namely

1. (1923) I L R 4 Lah. 367 at 368.

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to 90 days. The amending Act, therefore, has a different effect if applied to the original *Gazette of India* publication, or if applied to subsequent publications of Act IX of 1908. Under S. 78 of the Evidence Act there can be no doubt that the publication in the *Gazette of India* is the proper method of proving the Act and if there is a conflict between the two publications, preference will certainly be given to that in the *Gazette of India*. The later publications do not purport to be published by the authority of the Government of India but are printed by the Superintendent, Government Printing, India.

There is also another argument used by the Allahabad High Court in *A. G. Skinner* v. *Mukkaram Ali* (2), and that is that Act XXVI of 1920 makes no specific reference to Art. 177 and consequently it can only be deemed to amend that Article by implication, namely by altering the period under Art. 176 and retaining the word " Ditto " against Art. 177. This view has been adopted both by Calcutta and Bombay on the ground that it was the intention of the legislature to amend Art. 177. Nothing appears to that effect in the preamble of the amending Act and there is no reference to Art. 177 in the body of the Act. The word " Ditto " opposite to Art. 177 in the Act of 1908 was equivalent to the words " six months " and when that word "Ditto" is allowed to stand without alteration after the amendment of 1920, it is difficult to understand why its meaning should have been changed. Consequently, even if the word " Ditto " were to remain as in the subsequently published copies of the Act, its original meaning would not be changed unless the legislature had declared its intention to alter it. On all these grounds I respectfully agree with the decisions of the Lahore and Allahabad High Courts. The Bombay case in *Hussenuddin Nuruddin* v. *Dulakshidas Keshavlal* (3) contains only a very brief judgment based on the fact that the amending Act is applicable to the published Acts and not to the Act as printed in the *Gazette of India* and does not meet the arguments mentioned above. The Calcutta decision is that of a single Judge who by reason of the view he takes is constrained to reject altogether the Act as published originally in the *Gazette of India* as being " not an accurate and true version of the Act which the legislature enacted." When the Evidence Act distinctly lays down that this is the method of proving an Act of the Legislature, I regret that I cannot

2. (1925) A I R (All) 77. 3. (1925) A I R (Bom.) 299 [1.].

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agree with the view of the learned Judge that an Act so proved is not an accurate and true version. He goes further to hold that the Act can be proved by a means which is not contemplated in the Evidence Act and that such a proof is preferable to the proof laid down by the Statute. With all respect I cannot agree in this view. I therefore follow the decisions of the Lahore and Allahabad High Courts that the period of limitation under Art. 177 remained at six months even after the amending Act (Act XXVI of 1920). That being so, the learned District Judge was wrong in treating the second petition of the appellant as being out of time. The prayer for the restoration of the first petition was unnecessary. The main prayer was to bring on record a legal representative, and the application being within time, the prayer ought to have been granted.

I must therefore set aside the decree of the Lower Appellate Court and remand the suit to that Court for the hearing of the appeal after bringing on record the 1st respondent's legal representative. Costs will abide the result.

Court fee on the Second Appeal will be refunded.

A. S. V. *Decree set aside : Suit remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

Veerappa Chettiar (minor) and others ... *Petitioners* (L. Rs. of the deceased counter-petitioner—Defendant)*

v.

P. G. Sundaresa Sastrigal ... *Respondent (Petitioner—Plaintiff).*

Veerappa Chettiar v. Sundaresa Sastrigal.

Madras Civil Rules of Practice, R. 277—Scope and object of—"Or in any matter connected therewith"—Meaning of—Order directing pleaders not to appear—Jurisdiction—Civil Procedure Code, O. 3, R. 4—Scope of.

The plaintiff in two connected suits applied to the Court to restrain certain pleaders from appearing for the defendant, on the ground that they had appeared for him in previous suits against the defendant in which the subject-matter was the same as in the pending suits. The Court granted the prayer. In revision,

*C. R. P. No. 547 of 1924. 26th January, 1925.

it was contended for the defendant that the pleaders not being parties to the suits, the order was without jurisdiction and not covered by R. 277 of the Civil Rules of Practice. *Held,* the Court had power to refuse to hear practitioners who violated the rules regulating the procedure in Courts.

O. 3, R. 4, Civil Procedure Code, does not give an absolute right to a pleader to appear in a Court till the termination of the proceedings but only provides in what manner a pleader should be appointed and till what time the appointment would be in force. If a pleader is not competent to appear, plead and act in any Court under the rules governing the procedure in that Court, he cannot claim right of audience by virtue of O. 3, R. 4.

R. 277 of the Civil Rules of Practice is intended to regulate the proceedings in Courts and a practitioner of the Court has to conform to the rules governing its procedure. A pleader can appear for a party whose interest is opposed to that of the party for whom he had acted, drawn up pleadings or appeared, either with the latter's consent or when specially authorized by the Court. The rule contains a prohibition against the pleader's appearance unless the conditions therein laid down are satisfied. It is intended for the protection of both the pleader and the client. The object of the rule is not to save the pleader from a suit for damages by the party for whom he acted and against whom he subsequently acted, but to prevent an unreasonable conduct on the part of a person who engaged the pleader's services and afterwards gave him up without proper grounds.

The connection contemplated by R. 277 is not the connection of the parties or of the subject-matter. The words "in any matter connected therewith" mean connected with the suit or appeal or other proceeding in which the pleader gave the advice and does not refer to a subsequent suit, appeal or proceeding after the termination of the former suit, appeal or proceeding. The subsequent suit or proceeding or matter can be said to be connected with the previous suit or matter only if the former flows from or in consequence of the previous suit or proceeding. *Ramakrishna Pillai* v. *Balakrishna Aiyar* (1921) 41 M L J 60 and *Srinivasa Rao* v. *Pichai Pillai* (1913) I L R 38 Mad. 650 · 25 M L J 567 referred to.

Duties of legal practitioners referred to.

Petition under S. 115 of Act V of 1908 and under S. 107 of the Government of India Act, praying the High Court to revise the order, dated 24th June, 1924, of the Court of the District Munsif of Srirangam in C. M. P. No. 315 of 1924 in O. S. No. 103 of 1924 on its file.

K. V. Krishnaswami Aiyar and *R. Kesava Aiyangar* for petitioners.

T. M. Krishnaswami Aiyar and *K. G. Srinivasan* for respondents.

The Court delivered the following

JUDGMENT :—This is an application to revise the order of the District Munsif of Srirangam who directed two pleaders not to appear for the defendants in two suits pending in his Court as the plaintiff objected to their appearance inasmuch as

they had appeared for him in previous suits against the defendant in which the subject-matter was the same as in the suits now pending. The first contention of Mr. K. V. Krishnaswami Aiyar is that the District Munsif had no jurisdiction to pass such an order. It is argued that the pleaders are not parties to the suits and that they have no right of appeal against such an order and therefore the order is without jurisdiction and is not covered by R. 277 of the Civil Rules of Practice.

The District Munsif purported to act under R. 277 which is in these terms :—

> "Except when specially authorised by the Court, or by consent of the party, a pleader who has advised in connection with the institution of a suit, appeal or other proceeding, or has drawn pleadings in connection with any such matter, or has, during the progress of any such suit, appeal or other proceeding acted for a party, shall not, unless he first gives the party for whom he has advised, drawn pleadings or acted, an opportunity of engaging his services, appear in such suit, appeal or other proceeding, or in any appeal, or application for revision arising therefrom or in any matter connected therewith, for any person, whose interest is opposed to that of his former client, provided that the consent of the party shall be presumed if he engages another pleader to appear for him in such suit, appeal or other proceeding without offering an engagement to the pleader whose services he originally engaged."

It is conceded by Mr. K. V. Krishnaswami Aiyar that the Court has jurisdiction either to grant or to refuse such authority when a pleader applies for the same under the rule. But it is urged that when he does not make an application for special authority the Court has no jurisdiction to pass an order against him and that the only course open against a pleader who violates the rule is by a proceeding under the Legal Practitioners Act for unprofessional conduct.

Considerable stress was laid on O. 3, R. 4 of the Civil Procedure Code in support of the argument that a pleader's engagement lasts till the termination of the proceedings and therefore the Court cannot prevent the pleader from appearing for a party after he has filed his vakalat in Court. O. 3, R. 4 does not give an absolute right to a pleader to appear in a Court till the termination of the proceedings but only provides in what manner should a pleader be appointed and till what time the appointment will be in force. It assumes that a pleader is competent to appear, plead and act in the Court in which he wishes to plead and act. If he is not competent to appear, plead and act in any Court under the rules governing the procedure in that Court, he cannot claim right of audience by virtue of O. 3, R. 4. Is it open to a Second Grade Pleader

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to claim a right of audience in the District Court by filing a vakalat or for a First Grade Pleader to claim a right of audience in the High Court by filing a vakalat in Court for a party ? The District Court and the High Court will refuse to receive the vakalat of a pleader not entitled to appear before them and will refuse to allow him to act in that Court by reason of the rules governing their procedure. In *In re The Pleaders of the High Court* (1) it was held that Ss. 2 and 36 of the Code of Civil Procedure (Act XIV of 1882) did not give the pleaders of the Bombay High Court the right to appear in the Presidency Small Cause Court of Bombay wherein only barristers and attorneys had a right to practise. R. 277 is intended to regulate the proceedings in Courts and a practitioner of the Court has to conform to the rules governing its procedure. If he does not conform to the rules governing the procedure he cannot claim a right of audience in that Court. A pleader can appear for a party whose interest is opposed to that of the party for whom he had acted, drawn up pleadings or appeared in the same proceedings either with the latter's consent or when specially authorized by the Court. The rule contains a prohibition against the pleader's appearance unless the conditions therein laid down are satisfied. Supposing a pleader is disbarred or struck off the rolls, can he insist upon his right to appear in a Court in which he had filed his vakalat before he was disbarred or struck off the rolls by reason of O. 3, R. 4 ? R. 4 is only an enabling provision by which a pleader when he accepts an engagement and files his vakalat in Court is entitled to conduct the proceedings till he or his client dies or the termination of the proceedings. But this rule does not override the rules governing the qualifications of various classes of pleaders or the rules governing the procedure of the Courts. If the contention of Mr. K. V. Krishnaswami Aiyar is pushed to its logical conclusion it would mean that a pleader could appear for both the plaintiff and the defendant if the contending parties are foolish enough to engage the same pleader, and the Court would be powerless to prevent the pleader from appearing for both the plaintiff and the contesting defendant in the same suit. It is to prevent such conduct on the part of the pleaders and unreasonable conduct on the part of the clients that R. 277 of the Civil Rules of Practice has been enacted. In *Ramlall*

1. (1883) I L R 8 B 105 (F B).

Agarwallah v. *Moonia Bibee* (2), Wilson, J., held, following the principle of law laid down in the case of *Earl Cholmondeley* v. *Lord Clinton* (3), that an Attorney who has acted for a party to a suit and has discharged himself cannot afterwards act for the opposite party and that the Court had power to restrain him from doing so on an application made for that purpose. The High Court of Madras in their proceedings, dated 8th April, 1869, ruled that when a suit is remitted by order of an Appellate Court for rehearing or finding on an issue the proceedings on such order must be regarded as a further proceeding in the trial of the suit and, consequently, under S. 22 of Regulation XIV of 1816 a vakil cannot change sides and hold a vakalatnamah for the party opponent to the one for whom he appeared at the first hearing. (*See* 4 M. H. C. R. Appendix, page 43.) The Court has therefore power to refuse practitioners who violate the rules regulating the procedure in Courts.

It is next contended that the special authority required under R. 277 is only for the protection of the pleader against an action for damages by the party for whom he had acted and not for enabling the pleader to appear in Court for his opponent. The rule is no doubt intended both for the protection of the pleader as well as the client but not in the sense in which the appellant wants it to be understood. The object of the rule is not to save the pleader from a suit for damages by the party for whom he acted and against whom he subsequently acted but to prevent an unreasonable conduct on the part of a party who engaged the pleader's services and afterwards gave him up without proper grounds. If a party who gets advice from a pleader does not choose to engage his service for the conduct of the suit but engages another the pleader is not altogether debarred from accepting an engagement from the opposite party but he could do so by giving the former an opportunity to engage his services and if he refuses to engage his services and unreasonably withholds his consent he may appear for the latter with the special authority of the Court. It is to prevent unfair dealing by the parties that the Court is invested with the power to grant special authority to a pleader to appear against the party whom he gave advice or acted or appeared at an early stage of the proceedings. But for such power any rich party or an unscrupulous client

2. (1880) I L R 6 C 79. 3. 19 Ves. 261.

might prevent all leading pleaders from appearing for his opponent by seeking their advice by paying a nominal fee and then engaging the services of one or more of them to conduct the proceedings in Court.

Mr. T. M. Krishnaswami Aiyar for the respondent urges that there is a finding of fact that the suits now pending are connected with previous suits and the High Court should not interfere with the order of the Lower Court under S. 115 of the Civil Procedure Code. The facts are : The plaintiff filed O. S. No. 525 of 1912 afterwards numbered as 400 of 1914 against the defendant in which he asked for possession of a plot to the west of his house and prayed for a permanent injunction restraining the defendant from interfering with his right to the common lane to the north of the plot. In O. S. No. 860 of 1920 the plaintiff prayed for a mandatory injunction for the removal of a cross-wall put up by the defendant in a portion of the lane. The plaintiff has now brought two suits against the defendant, viz., O. S. No. 103 of 1924 for a mandatory injunction for removal of the balcony wrongly put up by the defendant over a portion of the common lane and for the removal of a portion of the defendant's drain encroaching on the common lane and O. S. No. 104 of 1924 for a mandatory injunction for removal of the arch of the veranda erected by the defendant on the ground that it had interfered with the free access of light and air to his house and for incidental reliefs. The District Munsif finds that the four suits are closely connected with one another. It is difficult to see the connection. If the same questions are in dispute now as were in dispute in the previous suits, the decision of the previous suits would be *res judicata* in the present ones. The connection contemplated by R. 277 is not the connection of the parties or of the subject-matter. The wording in R. 277 is "in such suit, appeal or other proceeding, or in any appeal, or application for revision arising therefrom, or in any matter connected therewith." The words "in any matter connected therewith" mean connected with the suit or appeal or other proceeding in which the pleader gave the advice and does not refer to a subsequent suit, appeal or proceeding after the termination of the former suit, appeal or proceeding. If a vakil appears for a party in a suit or proceeding, he cannot appear for the opposite party in subsequent proceedings in the same suit or proceeding, but that does not prevent a pleader

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who appeared for a party from appearing in a subsequent suit for the opposite party when the cause of action in the two are different. The subsequent suit or proceeding or matter can be said to be connected with the previous suit or proceeding or matter only if the former flows from or in consequence of the previous suit or proceeding. Otherwise there is no connection at all. If a plaintiff sues the defendant for possession of land on his title and succeeds and some time after brings a suit upon a fresh cause of action against the same defendant, there is no connection between the two suits though the defendant may raise the question of title of the plaintiff, but that would not be sufficient to establish a connection between the two. The question involved in the two suits in the District Munsif's Court are the right of the plaintiff to object to the defendant putting up certain structures and that right was not in dispute in the former suits. The causes of action are different, and the reliefs claimed are not the same. The District Munsif's exercise of jurisdiction was owing to a wrong interpretation of the rule and this Court has power to interfere with the order of the District Munsif as he exercised a jurisdiction not given to him by R. 277 of the Civil Rules of Practice.

The two cases *Ramakrishna Pillai* v. *Balakrishna Aiyar* (4) and *Srinivasa Rao* v. *Pichai Pillai* (5) relied upon by Mr. Krishnaswami Aiyar as supporting his contention are distinguishable from the present. In *Ramakrishna Pillai* v. *Balakrishna Aiyar and another* (4) the petitioner was plaintiff in O. S. No. 8 of 1917 and defendant in O. S. No. 56 of 1920 on the file of the Subordinate Judge's Court of Mayavaram. The respondents were two vakils of the Mayavaram Sub-Court who appeared for him in the former suit and for the plaintiff in the latter suit. The petitioner's application that audience should be refused to the vakil respondents who had filed O. S. No. 56 of 1920 for the plaintiff was rejected by the Subordinate Judge as he was not satisfied that there would be any conflict between their duty in representing the plaintiff in O. S. No. 8 of 1917 and in representing his opponent in O. S. No. 56 of 1920. Both the learned Judges who heard the C. R. P. against the order of the Subordinate Judge were of opinion that the suits were connected with one another. Spencer, J., observed at page 62 : " In both suits questions

4. (1921) 41 M L J 60. 5. (1913) I L R 38 M 650 : 25 M L J 567.

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arise as to the validity and binding character upon the petitioner of the indenture and whether he is estopped by reason of it from questioning the title of the defendant in the former suit and the title of the plaintiff in the second suit." The learned Judges allowed the petition and directed the Subordinate Judge to refuse to allow the respondents to conduct O. S. No. 56 of 1920 for the plaintiff. That case has no application to the present, as in that both the suits were then pending in the Mayavaram Court and as found by the learned Judges they were connected and some of the important questions arising in the suits were common to both suits. It is not the identity of the subject-matter that establishes the connection between the two suits or the identity of the parties, but the identity of the right or title that is asserted or denied, and the relief claimed.

In *Srinivasa Rao* v. *Pichai Pillai* (5) Miller, J., approved of the order of the District Munsif who prohibited a second grade pleader from appearing for the plaintiffs in O. S. No. 32 of 1913 on his file. The pleader appeared for the defendant in proceedings under S. 145, Criminal Procedure Code, and obtained an order in favour of the defendant and he filed O. S. No. 32 of 1913 for the defeated party. The District Munsif relied on R. 277 of the Civil Rules of Practice prohibiting the pleader from appearing for the plaintiff. In proceedings under S. 145, Criminal Procedure Code, the Magistrate decides only the question of possession and his order is to maintain the possession of the party found to be in possession at the time the proceedings are adopted. His order is subject to the result of a civil suit and is good only till the Civil Court decides which party is entitled to the property in dispute. The civil suit, therefore, in almost all cases, follows the order of the Magistrate and the proceedings in the civil suit are in a sense continuation of the proceedings before the Magistrate. Though the Magistrate enquires only into the question of possession, yet documents are relied upon by the parties for the purpose of proving their possession and the pleader who appears for a party necessarily acquaints himself with the title to the property and invariably peruses the documents produced by his client. With the knowledge of the strength and weakness of his client's title if he appears in the

5. (1913) I L R 38 M 650 at 651 · 25 M L J 567.

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civil suit for a party whose interests are opposed to his client's in the proceedings before the Magistrate, there is a danger of his using for his client in the civil suit the knowledge gained by him from his client in the proceedings in the Magistrate's Court. There is an intimate connection between the proceedings under S. 145, Criminal Procedure Code, in the Magistrate's Court and the civil suit filed in consequence of the order of the Magistrate.

If a pleader appears for a party in the proceedings in execution, he cannot appear in the suit filed by reason of the order in claim proceedings for a party whose interests are opposed to that of the party for whom he acted in the claim proceedings without his consent or without the authority of the Court in which the suit is pending. The suits now pending in the District Munsif's Court are not the necessary consequence of the previous suits. There is no connection between the present ones and the former suits. As observed by Spencer, J., in *Ramakrishna Pillai* v. *Balakrishna Aiyar and another* (4) the two suits will ordinarily be considered connected if they have any issue in common or involve substantially a determination of the same question of fact or the same mixed question of law and fact.

A few observations as to the duty of pleaders would not be out of place here. The legal profession is a very noble one, and no pleader should by his conduct consciously or unconsciously do anything to lower its high standard of morality, probity and honesty. The pleaders would do well to avoid any conduct on their part which is reasonably capable of being misunderstood. If a pleader advises or acts for a client he should not appear against him in any subsequent proceeding if he feels that he might in such proceeding even unconsciously use the information gained from his former client against him. Clients should have the fullest confidence in their legal advisers and should not be deterred or hampered in disclosing the strength and weakness of their cases by the fear that their instructions might at some future time be used against them by their legal advisers. It is the duty of legal practitioners to avoid even the suspicion that they might possibly use the information which they received in their professional capacity against the clients from whom they received them. There is no rule, etiquette or code of ethics to govern the conduct of clients. On the other hand, the pleaders who are guided and governed by

4. (1921) 41 M L J 60 at 63.

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the etiquette of the profession are not likely to do anything which would incur the censure of the profession, and, in order to prevent an unscrupulous or contankerous client from depriving his opponent of the services of pleaders R. 277 of the Civil Rules of Practice gives a discretion to the Court to specially authorise a pleader to appear and act for a party whose interests are opposed to those of the party for whom he at one time acted or appeared or gave advice.

We have no hesitation in holding that the plaintiff has no reason to complain of the conduct of the pleaders. He has only to thank himself if he lost the services of the two prominent pleaders. He could have retained them if he had cared. He engaged other vakils to appear for him and his petition to the District Munsif is evidently not to protect his own interests, for they require no protection, but to annoy the defendants and the pleaders whom he did not care to retain. Perhaps there is some motive at the bottom of the plaintiff's petition. We set aside the order of the District Munsif and allow the petition with costs throughout.

T. S. V. *Order set aside : Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR.

Ayisa Bivi Ammal ... *Appellant* (Petitioner—2nd defendant)*

v.

Jokara Bivi ... *Respondent (Respondent—Plaintiff).*

Ayisa Bivi Ammal v. Jokara Bivi.

Civil Procedure Code, S. 47—Question arising in execution between parties to suit—Partition suit—Decree for money passed against same party in favour of plaintiff and one of defendants in—Decree not a joint-decree—Claim for rateable distribution between the said parties under S. 73, Civil Procedure Code—Order on—Appealability under S. 47—Transfer of decree at instance of plaintiff and realisation of certain amount in execution—Defendant decree-holder if entitled to apply in execution to transferred Court without getting decree transferred at her instance.

The appellant was the 2nd defendant and the respondent was the plaintiff in a suit for partition on the file of the Court of the Additional District Munsif of Tiruvalur. In that suit a decree for partition was passed directing the 1st defendant in the suit to pay a certain sum to the respondent. That decree also directed that the 1st defendant in that suit should pay the appellant another sum of money, on the latter paying the necessary Court-fees. The respondent

*A. A. A. O. No. 37 of 1923. 17th February, 1925.

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got the decree transferred to the Court of the District Munsif of Negapatam, and in execution of the decree a certain amount was realised. The appellant applied to the Court of the District Munsif of Negapatam under S. 73 of the Civil Procedure Code claiming a share in the amount realised by the respondent by way of rateable distribution. The District Court held, affirming the Munsif, that the appellant was not entitled to execution in the Negapatam Court without the decree having been transferred at her instance to that Court.

On appeal filed against the said order of the District Judge, *held* (1) that the order under appeal fell within S. 47, Civil Procedure Code, and was appealable; (2) that, till the appellant got the decree transferred to the Negapatam Court at her instance, that Court had no jurisdiction to pass orders in connection with the decree at her instance.

Appeal against the appellate order of the District Court of East Tanjore at Negapatam, dated the 8th November, 1922, in A. S. No. 360 of 1921 preferred against the order of the Court of the District Munsif of Negapatam, dated the 14th October, 1921, in E. A. No. 422 of 1921 in O. S. No. 32 of 1918 on the file of the Court of the Additional District Munsif of Tiruvalur.

M. Subbaroya Aiyar for appellant.

K. V. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—This Civil Miscellaneous Second Appeal is against an order of the District Judge of East Tanjore, at Negapatam affirming an order of the District Munsif dismissing a petition for rateable distribution under S. 73 of the Code of Civil Procedure. The appellant is the second defendant and the respondent is the plaintiff-decree-holder in O. S. No. 32 of 1918 on the file of the Court of the Additional District Munsif of Tiruvalur. In that suit a decree for partition was passed to the effect that the first defendant in the suit was to pay the plaintiff a certain sum of money and he was also directed to pay the present appellant another sum of money. The relevant portion of the decree is as follows :—

"This Court doth order and decree that the 1st defendant do pay to the plaintiff (for her share) the sum of Rs. 2,999-8-0 with interest thereon at the rate of 6 per cent. per annum from this date to the date of realization of the said sum and do also pay to the plaintiff the sum of Rs. 352-3-2 for her costs of this suit with interest thereon at the rate of 6 per cent. per annum from this date to the date of realisation. And this Court doth further order and decree that on payment by the 2nd defendant of the necessary Court-fees amounting to Rs. 175 due to Government, 1st defendant do pay to the 2nd defendant (for her share), the sum of Rs. 2,999-8-0 with interest thereon at the rate of 6 per cent. per annum from this date to the date of realisation of the said sum."

This decree was passed by the Additional District Munsif of Tiruvalur. After the passing of the decree, the respondent

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here, *viz.*, the plaintiff, got it transferred to the Negapatam Court and in execution of the decree a certain amount has been realised. The present appellant filed an application under S. 73 of the Code of Civil Procedure claiming a share by way of rateable distribution and this petition has been dismissed by both the Lower Courts. The learned District Judge held that the appellant " is not entitled to execution in the Negapatam Court without the decree having been transferred at her instance to the said Court. "

Mr. Krishnaswami Aiyar on behalf of the respondent has taken a preliminary objection that no second appeal lies in this case inasmuch as the contest here is between two rival decree-holders in which the judgment-debtor has no interest and the order appealed against does not therefore come under S. 47 of the Code of Civil Procedure. In support of his contention he has relied upon three decisions, namely, *Varada Ramaswami* v. *Vumma Venkataratnam* (1), *Rajah of Karvetnagar* v. *Venkata Reddi* (2) and *Venkatakrishna Pattar* v. *Krishna Pattar* (3). I think these cases are clearly distinguishable. In the case reported in *Varada Ramaswami* v. *Vumma Venkataratnam* (1) the respondent " obtained a decree against a certain judgment-debtor, Mothivala Usman, in O. S. No. 776 of 1916 on the file of the Ellore District Munsif. In execution he attached certain moneys belonging to the judgment-debtor. Various other decree-holders who are appellants now before us applied for and obtained rateable distribution under S. 73 of the Code of Civil Procedure. The money was distributed. On appeal the order for rateable distribution was set aside by the Court. The respondent then applied for the return of the money which had been paid to the other decree-holders. " One of the questions for decision in the case was whether the order for rateable distribution can be considered to be an order under S. 47 of the Code of Civil Procedure. The learned Judges held that the order did not fall within S. 47 of the Code of Civil Procedure since it was passed on contest between rival decree-holders and no objection to the rateable distribution was raised by the judgment-debtor and it was not suggested that his interests were directly or indirectly affected. The facts of the case show that the contest was not between parties to the suit in O. S. No. 776 of 1917 but between the decree-holder in that suit and various other decree-

1. (1921) 42 M L J 473. 2. (1915) I L R 39 M 570 : 29 M L J 96.
3. (1916) 31 M L J 820.

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holders ; clearly, therefore, the order did not fall within S. 47 as it did not settle any question arising between the parties to the suit in which the decree was passed. In *Rajah of Karvetnagar* v. *Venkata Reddi* (2) referred to in *Varada Ramaswami* v. *Vumma Venkataratnam* (1) their Lordships Seshagiri Aiyar and Kumaraswami Sastri, JJ. observe that orders passed under S. 73 of the Code of Civil Procedure are appealable if they affect parties to the suit. The same view is also expressed in *Venkatakrishna Pattar* v. *Krishna Pattar* (3). If the parties to the proceedings in question are not parties to any common suit then the orders passed in such proceedings cannot obviously fall under S. 47 of the Code of Civil Procedure. In the present case the question arising for decision is raised in execution between parties to the suit though the second defendant—the decree being one passed in a partition suit—is also in the position of a decree-holder like the plaintiff. I, therefore, overrule the preliminary objection.

As regards the merits of the case, I am inclined to agree with the view of the learned District Judge. It has been argued that a transfer of the decree at the instance of the appellant is not necessary in this case as the decree had already been transferred to the Negapatam Court at the instance of the plaintiff-respondent. No authority directly bearing on the question has been cited before me by either side. The argument advanced on behalf of the appellant overlooks the fact that the decree in question is not in the nature of a *joint decree*. In the partition suit the plaintiff has obtained a money decree and the second defendant has also been given such a decree. The plaintiff's decree can be executed without any reference to the decree given in favour of the second defendant. The only decree for execution now before the Negapatam Court is the decree obtained by the respondent which has been transferred to it for execution under the provisions of the Code of Civil Procedure. In my opinion the second defendant-appellant is not entitled to execute the decree made in her favour without getting it transferred at her instance to the said Court. Till such a transfer is effected the Negapatam Court has no jurisdiction to pass orders in connection with the decree at the instance of the appellant. This Civil Miscellaneous Second Appeal fails and is dismissed with costs.

A. S. V. *Appeal dismissed.*

1. (1921) 42 M L J 473. 2. (1915) I L R 39 M 570 : 29 M L J 96.
3. (1916) 31 M L J 820.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Hathoor Gramathil Valia Manayil-
parkum Okkilikkara Siddayya
and another ... *Petitioners** (*Defendants*)

v.

Munnambeth Ambu Nair ... *Respondent* (*Plaintiff*).

Okkilikkara Siddayya *v.* Ambu Nair.

Civil Procedure Code, O. 9, R. 13—Setting aside ex parte *decree—Defendants agreeing to take oath—Failure of plaintiff to attend—Duty of Court—Oaths Act, S. 11—Evidence when conclusive.*

An application was put in to set aside an *ex parte* decree and on the defendant consenting to take oath that he was not aware of the institution of the suit, the plaintiff agreed to abide by such oath. The parties were asked to go and bathe before taking the oath in the presence of a Commissioner. The defendant came back after the bath, but the plaintiff did not, as a consequence of which the oath was not taken and the Commissioner made a report to that effect. The Court heard the parties, but without allowing the defendant to let in oral evidence of their allegations dismissed their application. *Held,* (1) the failure of the plaintiff to be present to hear the oath taken did not *ipso facto* entail a setting aside of the *ex parte* decree, as under S. 11 of the Ooaths Act it is only if oath is taken that it is conclusive proof of the matters stated ; declining afterwards to take oath or failure to do so is only a circumstance which the Court can take into consideration in deciding the case. *Ulagappa Chettiar* v. *Peria Karuppan Chettiar* (1912) M W N 361 followed ; *Ayyakannu Nadar* v. *Muthiah Nadar* 17 M L J 99 distinguished ; (2) the defendant should be given an opportunity to adduce oral evidence to prove that he was not aware of the institution of the suit.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the order, dated the 25th September, 1922, of the Court of the Subordinate Judge of Tellicherry in S. E.A. No. 268 of 1922 in S. C. S. No. 343 of 1921.

V. P. Karunakara Nambiar for petitioner.

O. T. Govindan Nambiar for respondent.

The Court delivered the following

JUDGMENT :—This is an application to revise the order of the Subordinate Judge of Tellicherry passed on a petition by the defendants to set aside an *ex parte* decree passed against them. The defendants filed an application to set aside the *ex parte* decree which was dismissed by the Subordinate Judge on 16th August, 1922. The present application is to set aside the order passed on the previous application and also to set aside the *ex parte* decree. After the application was filed both parties filed a joint affidavit in which the defendants consented to take oath and the plaintiff agreed to abide by the

*C. R. P. No. 173 of 1923. 20th February, 1925.

oath of the defendants. On the date when the oath was to be taken by them, the plaintiff and the defendants appeared and they were asked to go and bathe before taking the oath. The defendants came back after the bath but the plaintiff did not return in consequence of which the oath was not taken and the Commissioner made a return to that effect. The Subordinate Judge heard the parties and dismissed the application of the petitioners.

It is contended by Mr. Karunakaran Nambiar for the petitioners that the Subordinate Judge should have set aside the *ex parte* decree as the plaintiff failed to be present to hear the oath taken and he relies upon a case in *Ayyakannu Nadar* v. *Muthiah Nadar* (1). In that case it was held that if a party who has agreed to be bound prevents the oath being taken, the other party is entitled to a decree. On the strength of this ruling the petitioners want an order in their favour. That case has no application to the present, for in that case it was the plaintiff who ought to have adduced evidence of certain facts to prove his case and in the absence of evidence the Court was justified in dismissing the suit. Under the Oaths Act, S. 11, the evidence so given shall, as against a person who offered to be bound as aforesaid, be conclusive proof of the matters stated ; if a party attacks them as regards any fact the oath is proof of that fact and the Court is bound to accept that as proof of that fact. But if the party who agrees to take an oath declines afterwards or fails to take the oath the Court may only take that circumstance into consideration in deciding the case. The absence of an oath or refusal to take an oath would not import into the case evidence which was not otherwise adduced before it. This view was held by a Bench of this Court in a case reported in *Ulagappa Chettiar* v. *Peria Karuppan Chetty* (2). In the present case the defendants failed to take the oath that they were not aware of the institution of the suit and that they were not liable to the plaintiff. The failure to take the oath would not and could not be treated as evidence that they were not aware of the institution of the suit and that they were not liable to the plaintiff for the amount claimed by him. The failure to take the oath was due to the plaintiff's conduct in not appearing before the temple to hear the oath taken. In the circumstances, the

1. (1906) 17 M L J 99. 2. (1912) M W N 561.

Lower Court ought to have called upon the defendants to prove their allegations by oral evidence and if they declined to do so, the Court should have dismissed the application for want of evidence on their part. Such a course was not pursued in this case. The learned Sub-Judge heard the parties and dismissed the application. I think this course was not a proper course to adopt in a case of this kind. I therefore set aside the order dismissing the petition and direct the Subordinate Judge to restore the petition to file and dispose of it according to law. In so doing the Subordinate Judge would direct the petitioners to pay the costs of the plaintiff incurred by their negligence without reference to the ultimate result of the case. The costs of this petition will be provided for in the order that the Subordinate Judge may pass on the petition.

T. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

K. K. S. Mamundi Konar ... *Petitioner** (*1st respondent*)

v.

P. Shamsuddin Sahib Bahadur... *Respondent* (*Petitioner*).

Madras District Municipalities Act (V of 1920)—Rules for the decision of disputes, R. 11—Rejection of vote by Returning Officer—If can be questioned by Election Court—Interference by High Court—Civil Procedure Code, S. 115—Polling Officer—Duty of.

Some ballot papers in an election contained besides the cross-mark against the name of one of the candidates, lines scoring out the names of the other candidates. The Returning Officer treated these votes as invalid, but the Election Court held them to be valid in spite of those lines. *Held*, under R. 11 of the Rules for the decision of disputes as to the validity of Municipal elections the Court had jurisdiction to decide for itself whether the Returning Officer's rejection or refusal of a vote was proper. Where the Election Court decided that the marks on the ballot papers had not the effect of identifying the voters and on that basis declared those votes to be valid, the decision is entirely within its jurisdiction and cannot be interfered with in revision under S. 115, Civil Procedure Code. In such a case the High Court cannot decide for itself whether the votes were or were not valid, but has only to see if the Lower Court exercised its jurisdiction properly.

Where a voter presents himself before a polling officer, all that the latter has to see is whether the name of the voter is on the roll, and if it is there, he must be allowed to vote ; but before the Election Court, it is open to the parties to prove that the person who voted was not on the roll.

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*C. R. P. No. 24 of 1925. 12th March, 1925.

Mamundi Konar v. Shamsuddin Sahib Bahadur.

Petition under S. 107 of the Government of India Act, 1915, and S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Trichinopoly, dated 23rd December, 1924, in O. P. No. 31 of 1924 on its file.

A. Krishnaswami Aiyar and *B. V. Viswanatha Aiyar* for petitioner.

T. V. Ramanatha Aiyar for respondent.

The Court delivered the following

JUDGMENT :—This Civil Revision Petition is a petition praying that this Court will interfere and set aside a finding of the Election Court of the Subordinate Judge of Trichinopoly in the matter of an election petition before it. At an election for a Councillor for the first ward in the Trichinopoly Municipality held on 26th Sept., 1924, the Chairman, who was the Returning Officer, declared that the present petitioner was elected, having polled 71 votes as against 70 votes for the respondent. The latter filed an election petition in the Subordinate Judge's Court, and, on enquiry, the Subordinate Judge decided that the correct number of valid votes was 72 for the respondent and 71 for the petitioner, and declared the respondent duly elected. The petitioner applies for revision of that finding and declaration.

Only two points are pressed before me : firstly, that the votes, Exs. G and G1, are invalid votes, and were, therefore, wrongly counted in favour of the respondent ; and secondly, that the vote of P. W. 5, one Murugesan, was not a valid vote.

As to the first point, Exs. G and G1 appear to show, besides the cross-mark against the name of the respondent, lines scoring out the names of the other candidates. The Returning Officer did not take these votes into consideration in respondent's favour apparently because of these lines. The Election Court held them to be valid in spite of these lines. Before me the petitioner contends that the Election Court had no jurisdiction to go behind the decision of the Returning Officer in a matter of this kind, that the Election Court is not a Court to which any authority is given to decide, as a question of fact, whether a vote is or is not valid, and that the proper scope of the Election Court's jurisdiction is limited to an enquiry whether the Returning Officer had or had not exercised the jurisdiction vested in him of deciding whether or not a vote was valid ; in other words, petitioner contends for the position that in the matter of the validity of a vote, the Return-

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ing Officer is the final authority. This contention seems to me justified neither by the rules governing the conduct of election or enquiries by the Election Courts nor by reported decisions of the Courts of Law, either in this country or in Great Britain. R. 11 of the Rules for the Decision of Disputes as to the validity of an election held under the Madras District Municipalities Act, 1920, clearly lays down that, in an enquiry of this kind, the Election Court has to decide whether or not "the result of the election has been materially affected by the improper reception or refusal of a vote." To restrict this to an enquiry whether the Returning Officer's reception or refusal of a vote was or was not within his jurisdiction is to make the rule almost otiose. The rule plainly gives the Election Court jurisdiction to decide for itself whether the Returning Officer's rejection or refusal of a vote was proper, and, if it was not proper, and the result of the election has been materially affected thereby, it may set aside the election and order a fresh one, or, if the result of the scrutiny is to give a majority to another candidate, it may declare that candidate duly elected. The case-law referred to by the petitioner's learned vakil seems to me to be entirely against him. The leading case on the point in *Woodward* v. *Sarsons* (1) distinctly lays down that the decision in each case, namely, whether a ballot paper is void or not, is, "upon a point of fact, to be decided first by the Returning Officer, and afterwards by the Election Tribunal on petition," and the Election Court proceeded in that case to decide for itself whether or not certain marks on the ballot papers did or did not invalidate the votes. The same course was followed in the *Stepney case* (2) and the *Wigtown case* (3) and numerous other cases might be quoted to the same effect. S. 2 of the Ballot Act, 1872, 35 and 36 Vict. c 33 distinctly lays down that "the decision of the Returning Officer as to any question arising in respect of any ballot paper shall be final subject to reversal on petition questioning an election or return." It has not been suggested and no authority is quoted before me for the proposition that the law is different in this country. Election Courts in this country have from time to time in deciding such questions as to the validity of votes held a scrutiny of votes, etc., and I do not recall any instance in which their jurisdiction to do so has been questioned. It is

1. L R 10 Com. Pleas 733 at 748. 2. 4 O'Mally and Hardcastle, 37.
3. 2 O'Mallay and Hardcastle, 215.

plain that the Lower Court had ample jurisdiction to decide, as a question of fact, whether Exs. G and G1 were valid votes. It has considered the question of their validity from the right point of view, namely, whether any reasonable ground had been shown for the conclusion that by the marks on the votes, the voters might be identified, and decided that they could not, and it held that the votes were valid. Such a decision was within its jurisdiction, and there is in that decision neither lack of jurisdiction nor irregular exercise of jurisdiction, which would give this Court authority to interfere under S. 115 of the Civil Procedure Code. It cannot be reasonably contended here that this Court has to decide for itself on the question of fact as to whether the votes were or were not invalid. This Court, in a Civil Revision Petition, has only to see that the Lower Court exercised its jurisdiction properly. I find, therefore, that there is nothing to be said in favour of petitioner's first point.

As to the second point, the question of fact for decision was whether P. W. 5 was or was not entered on the electoral roll as a voter. The petitioner urges that, as both P. W. 5 and R. W. 3 answer to the description namely "Murugesan, fitter," therefore the Roll so far as this name is concerned, is a document ambiguous or defective, within the meaning of S. 93 of the Indian Evidence Act, which prohibits evidence being taken to remove ambiguity or defect. I do not see what application S. 93 has to this case. All that the Polling Officer had to see when the voter presented himself to him was whether the name of the voter was on the roll. It cannot reasonably be contended that the Polling Officer has to wait to the end of the day in respect of every vote in order to see if any one else of the same name appears and claims that he is the voter on the Roll. P. W. 5 appeared to vote. His name corresponded with the name on the Roll and he was allowed to vote. There was no irregularity in the procedure. It was open to petitioner to prove that P. W. 5 was not the person on the Roll, but that he did not do, nor does R. W. 3 claim that he is the person on the Roll. There was no lack of evidence on which the Lower Court could conclude that P. W. 5's vote was valid, and there is no case here either for interference under S. 115, Civil Procedure Code.

I, therefore, dismiss the petition with costs.

T. S. V. *Revision petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER.

Changanath Kuttappa Nair ... *Petitioner** (*Petitioner*)

v.

Pooppil *alias* Valamarudur Variyatha Lakshmi Varasiar and others. .*Respondents* (*Respondents.*)

Kuttappa Nair *v.* Pooppil.

Decree—Amendment—Jurisdiction—Decree affirmed on appeal—Amendment of—Appellate Court's power of—Decree of first Court not in accordance with its judgment.

The preliminary decree in a suit to enforce a mortgage was not in accordance with the preliminary judgment. There was an appeal to the Sub-Court against the decree which was dismissed with immaterial alterations.

After the disposal of the appeal, the plaintiff applied to the Sub-Judge to amend the first Court's decree so as to bring it in conformity with the judgment. But the Sub-Judge declined to do so, thinking that he had no power to do so.

Held, that the Sub-Judge was wrong in declining to amend on the ground relied upon by him.

Where there has been an appeal any order to amend the decree so as to make it agree with the judgment should be passed by the Appellate Court.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order dated 3rd February, 1922 and made in M. P. No, 468 of 1921 on the file of the Court of the Subordinate Judge of South Malabar, Calicut, in A. S. No. 25 of 1919 in the said Court (O. S. No. 428 of 1917 on the file of the Court of the Additional District Munsif of Tirur).

P. Govinda Menon for petitioner.

D. A. Krishna Variar for respondents.

The Court delivered the following

JUDGMENT :—The preliminary decree is not in accordance with the preliminary judgment, as in the plaint the mortgagee asked for the mortgaged property to be sold and for payment of the amount found to be due to him out of the sale proceeds, and the judgment of the Court was "the suit is decreed as prayed for"; but the preliminary decree, as drawn up, did not provide for any payment being made to the plaintiff but provided for payment of the amount found to be due to a subsequent mortgagee and the balance to the mortgagors.

There was an appeal which was dismissed with a slight modification as to the personal remedy.

Now the Subordinate Judge, after disposing of the appeal, has declined to bring the first Court's decree in accordance with the judgment.

*C. R. P. No. 627 of 1922. 20th November, 1924.

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I think he was wrong in thinking that he had no power to amend the decree and in declining jurisdiction. It was held in *Shivlal Kalidas* v. *Jumaklal Nathiji Desai* (1) and numerous other cases that where there has been an appeal any order to amend the decree so as to make it agree with the judgment should be passed by the Appellate Court. As observed by Sir T. Edge, C. J., in *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (2), if the original Court were allowed to amend its decree the result might be that it would become essentially a different decree from that which the Appellate Court intended to confirm. The only executable decree is that of the Appellate Court which incorporates the decree of the Lower Court when it confirms it. No doubt the mistake might have been corrected by means of a memo. of objections at the time when the Appellate Court had cognizance of the case. But this omission will not have the effect of taking away the plaintiff's inherent right to have a decree in accordance with the judgment passed in his favour. [Vide *Sahadeo Gir* v. *Deo Dutt Misir* (3)]. I observe that the final decree does provide for payment of what is declared due to plaintiff out of the sale proceeds, but as the objection that, this being so, it will be unnecessary to amend the preliminary decree was not the ground of the Subordinate Judge's order declining jurisdiction it may be left for consideration when the petition for amendment is finally disposed of. I set aside the order of the Subordinate Judge and direct him to take the petition on file and dispose of it according to law. The respondent to pay the petitioner's costs of this Civil Revision Petition.

A. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR

B. R. Ramanujachariar ... *Petitioner** (*Accused*)

v.

T. V. Kailasam Aiyar ... *Respondent* (*Complainant*).

Ramanujachariar v. Kailasam Aiyar.

Madras Local Boards Act (XIV of 1920), S. 159 read with S. 207—Prosecution for offence under—Maintainability—Prosecution launched more than three years after expiry of first notice to accused—Acquittal previously of accused of same charge by competent Court—Effect—S. 223—S. 159—Real offence under—

*Cr. R. C. No. 605 of 1924.
(Cr R P No. 506 of 1924). 8th January, 1925.

1. (1893) I L R 18 B 542. 2. (1888) I L R 11 A 267 at 274 (F B).
3. (1915) I L R 37 A 323.

Ramanujacharlar v. Kailasam Aiyar.

When committed—Fresh notices in respect of same encroachment—Non-compliance with—No fresh offences by reason of.

The petitioner was charged with an offence under S. 159 read with S. 207 of the Madras Local Boards Act XIV of 1920. He pleaded that for the same offence he was previously charged on the file of the same Court, that the complaint was then withdrawn by the local authority, and that the order of acquittal then passed by the Magistrate under S. 248 of the Criminal Procedure Code was a bar to the prosecution.

Held, that the prosecution was not sustainable, (1) because the original offence was at any rate committed on the expiry of the first notice given by the local authority to the accused, and the prosecution in question was not launched within three months of that date as provided by S. 225 of the Act; and (2) because there had been an acquittal by a competent Court in respect of the offence charged against the accused in the year 1923.

The real offence under S. 159 of the Act is the wrongful encroachment that is committed by the person, and that offence is, at any rate, complete on the expiry of the notice by which the person is called upon to remove the encroachment and fails to do so within the time limited in the notice. It will be against all principle to hold that, even though a person commits an offence by thus disobeying the terms of the notice he should be deemed to commit a fresh offence every time the local authority chooses to give a fresh notice calling upon him to remove the obstruction.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Stationary Second Class Magistrate of Mannargudi, dated the 11th August, 1924, and made in C. C. No. 166 of 1924 and to quash all proceedings in the said C. C. No. 166 of 1924.

V. L. Ethiraj for *T. R. Srinivasa Aiyangar* for petitioner.

C. Kunhiraman for respondent.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER :—The petitioner in this case was charged before the Stationary 2nd class Magistrate of Mannargudi with an offence under S. 159 read with S. 207 of the Local Boards Act (Madras Act XIV of 1920). He raised a plea in bar of the prosecution on the ground that for the same offence he was previously charged in C. C. No. 215 of 1923 on the file of the same Court, that the complaint was then withdrawn by the local authority and that the order of acquittal then passed by the Magistrate under S. 248 of the Criminal Procedure Code was a bar to the present prosecution. The learned Counsel for the District Board of Tanjore has contended before me that according to the scheme of the Act the offence consisted not in the encroachment alleged to have been made by the accused but in his failing

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to comply with any direction lawfully given to him within the terms of cl. (*c*) of S. 207 of that Act and that therefore the local authority was entitled again and again to give notice under S. 159 and every time the conditions in the notice were not complied with there would be an offence committed by the person to whom such notice is given. There is a very fatal objection to the maintainability of such a contention. Under S. 223 of the same Act it is provided that "no person shall be tried for any offence against the provisions of this Act or of any rule or by-law made under it unless complaint is made by the police or the President of a Local Board, or by a person expressly authorised in this behalf by the Local Board or its President within three months of the commission of the offence." The contention of the learned Counsel for the District Board of Tanjore comes to this: that it is within the powers of the Local Board to extend the period of limitation prescribed by S. 223 by giving fresh notice and constituting the disobedience to each of such fresh notices as amounting to an offence under S. 207. To construe it in that manner would obviously be to defeat the provisions of the principle underlying S. 223. I take it that the real principle underlying that section is that it should not be within the power or province of a local authority to molest and annoy persons by prosecutions which are not promptly undertaken by the local authority. If this view is correct it follows that the original offence was at any rate committed on the expiry of the first notice given by the local authority to the accused. The prosecution therefore was liable to be launched within three months of that date, and, as the present prosecution is undertaken long after the expiry of three months from that date, the present complaint is not sustainable.

Even apart from this, there is another objection to the maintainability of the present prosecution. There has been an acquittal by a competent Court in respect of the offence charged against the accused in the year 1923. If it was an offence not to comply with and carry out the directions of the notice issued by the local authority in the year 1923 and if on that offence the accused was acquitted he cannot possibly be tried again for the same offence and I cannot read the sections of this Act as contemplating different offences being committed in respect of the same subject-matter every time the local authority chooses to give a fresh notice and launch a prosecution. My attention has been drawn to the second clause of S. 207 which provides for enhanced sentence in the case of persistent

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or old offenders. That has, however, nothing to do with the question what is the offence that is contemplated by the Act for which a penalty is provided. It is no doubt true that S. 159 of the Act is not very happily worded. Taking a common sense view of the provisions of S. 159, it seems to be clear that the real offence in such cases is the wrongful encroachment that is committed by the person. The notice referred to in the section is in a sense merely in the nature of a condition precedent to the prosecution and all that the Act says is that one should be prosecuted straightway simply because he has committed or is deemed to have committed an act of encroachment, but the Act requires that some notice should be given to him and that he should be prosecuted only if, even after such notice,he fails to remove the encroachment. No doubt the contention that it is merely a failure to comply with the direction contained in the notice can be advanced, having regard to the terms of S. 207 of the Act ; and having regard to those terms it is impossible to say that the offence is complete even before any notice is given because the Legislature clearly treats as an offence only a failure to comply with the terms of the notice. But, taking the real nature of the acts said to constitute the offence and the terms of all the sections, it is clear that an offence within the meaning of the Act comes to be committed at any rate on the expiry of the notice by which the person is called upon to remove the encroachment and fails to do so within the time limited in the notice. It will be against all principle to hold that, even though a person commits an offence by thus disobeying the terms of the notice he should be deemed to commit a fresh offence every time the local authority chooses to give a fresh notice calling upon him to remove the obstruction. In any view, therefore, the present prosecution cannot possibly be sustained, and I must therefore hold that the Sub-Magistrate was wrong in the view taken by him that the plea in bar was not valid. In my judgment the plea is not only valid but sound and in that view the complaint should be dismissed and I direct accordingly.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Nilambur Thacharakavil Manavedan Thirumalpad Avergal ... *Appellant** (*Plaintiff's L. R.*)

v.

Messrs. Parry and Company, a Limited Company carrying on business at Devala and elsewhere having their Head Office at Madras ... *Respondent* (*Defendant*).

Manavedan Thirumalpad *v.* Messrs. Parry & Co.

Lease—Surrender—Implication of, from acceptance of another lease—English Law as to—Applicability in India—Limitations of English rule—Leases not inconsistent—No surrender of first by acceptance of second lease.

In 1862 the plaintiff's predecessor granted a lease of 500 cawnies in a certain locality for a rent of Rs. 500 to be paid for coffee cultivation to M for a period of 91 years. In 1879 the plaintiff's predecessor granted another lease of 20 acres out of those 500 cawnies to M for gold washing for a period of 56 years.

On a question being raised as to whether the grant of the mining lease implied a surrender of the lease for coffee cultivation for the area over which gold washing operations were conducted, *held,* on a construction of the two leases and having regard to the intention of the parties, that the second lease was not inconsistent with the continuance of the first and that there was therefore no surrender of the first lease by the acceptance of the second.

Per Spencer, J.—It is only in cases where there is some incompatibility between the enjoyment under the new lease and the enjoyment under the prior lease that the second will involve a surrender of the first.

Per Ramesam, J.—Delivery of possession is not a necessary part of the transaction of a lease under the Transfer of Property Act. The implication therefore under the English Law of a surrender of a prior lease by the acceptance of a later one is not necessary in the law as it stands now in India.

Even where the leases are of the same kind, they are overlapping, and the terms of the second are somewhat inconsistent with the terms of the first, all that is necessary to imply is a cancellation of the first, only for the period which is overlapped by the second. It is an *a fortiori* case where the second lease is of a different kind.

The rule of the English law that, even if the intention of the parties is not to cancel the first lease, the law will imply a surrender, ought not to be adopted in India.

Appeal against the decree of the Court of the Subordinate Judge of Nilgiris, Ootacamund, in Original Suit No. 123 of 1920.

T. R. Ramachandra Aiyar, T. S. Narayana Aiyar and *T. S. Anantaraman* for appellant.

K. P. M. Menon and *T. A. Krishna Variar* instructed by *J. R. Atkinson* for respondent.

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*Appeal No. 71 of 1922. 6th March, 1925.

The Court delivered the following

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Spencer, J.

JUDGMENTS :—*Spencer, J.* :—This suit was brought by Nilambur Rajah for recovery of possession together with damages for use and occupation of 20 acres of land and for value of buildings and machinery removed by the defendant upon a certain area which had been granted on lease by the plaintiff's predecessor on 14th August, 1879, to Mr. Minchin for gold washing for a period of 36 years which expired on 14th August, 1915.

In 1862 the plaintiff's predecessor granted a lease of 500 cawnies in the same locality for a rent of Rs. 500 to be paid for coffee cultivation to the same Mr. Minchin for a period of 91 years. That lease has not expired and will not expire till 1953. Messrs. Parry and Company, who are the defendants in this suit, obtained as assignment from Mr. Minchin of all his rights in both leases. The contention on the part of the plaintiff, who is the appellant in this Court, is that the grant of a mining lease implied a surrender of the lease for coffee cultivation for the area over which gold washing operations were conducted. This contention is based upon the English Rule of Law that the acceptance of a new lease operates as a surrender of a prior lease. In Woodfall on Landlord and Tenant the learned author exulains this rule as being founded upon estoppel. He says that as a lessee is estopped from saying that his lessor has no power to give him the lease and as the lessor cannot grant a new lease during the continuance of the old lease, it follows that the acceptance of the new lease implies a surrender of the first lease. An exception to this rule occurs if what is accepted by the lessee is the grant of a thing collateral to and consistent with the lease of the land. Instances are given in which the grant of a new thing does not imply the surrender of the thing first granted. Mr. Ramachandra Aiyar argues that the two operations, coffee planting and gold mining, cannot be carried on simultaneously, as one operation would interfere with the peaceful enjoyment of the other right over the soil. We must therefore see what was the intention of the parties when they gave and received the two lease deeds, Exhibits I and II. In the first place it is noteworthy that the lessee in both the leases is the same person, and therefore the lessee is in a position to make arrangements for the two operations of coffee planting and gold washing being carried on side by side in such a way as not to inter-

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fere with each other. Next it is noticeable that the rent under the two agreements was agreed to be paid simultaneously and that under cl. 4 of Ex. A, which is a counterpart executed by the lessee in favour of the lessor, he agreed that he would not ask for any diminution of the rent due under the lease for cultivation on account of the execution of the gold sifting works in the same area, thus showing that the two operations might go on side by side and that the mining lease was not intended to involve a surrender of any portion of the land leased for coffee planting. Taking all the circumstances into consideration I feel clear that the grant of the second lease was not inconsistent with the continuation of the first, and that it is only in case where there is some such incompatibility between the enjoyment under the new lease and the enjoyment under the prior lease that the second will involve a surrender of the first.

As regards the removal of machinery, etc., under the cultivation lease the lessee is entitled to keep the machinery upon the land leased to him until that lease expires, and the fact that under cl. 7 of Ex. A his landlord was expressly exempted from liability to pay compensation for machinery and buildings left upon the land itself indicates that the property in them was regarded as remaining with the tenant who erected them. Thus whether the gold mining plant is removed or left standing, the landlord cannot now demand to be paid anything on that account. In this view the plaintiff has no legal claim against the defendant and his suit was rightly dismissed in the Lower Court. The appeal must be dismissed with costs.

Ramesam, J.

Ramesam, J. :—I agree. The learned vakil who argued the case for the appellant relied in support of his proposition on Woodfall on Landlord and Tenant, page 363, Redman on Landlord and Tenant, page 561, Foa on Landlord and Tenant, page 697, Bacon's Abridgment of the Law, Vol. IV and Halsbury's Laws of England, Vol. XVIII, page 1061. These references no doubt lay down that when there is a second lease by the same lessor to the same lessee there is an implied surrender of the first lease. In England at one time it was necessary for the validity of the lease that the lessor should be in possession of the lands leased. *See* Woodfall, p. 2. (It has now been changed by the Real Property Act of 1845.) It seems to follow from this that when a second lease was made, the lessee admitted that the lessor was in

possession, or at any rate, was estopped from questioning that the lessor was in possession. The result is that the surrender of the first lease was implied; but it does not seem to me that this implication is necessary in the law as it stands now in India. S. 105 of the Transfer of Property Act defines a lease as a transfer of the right to enjoy certain property. S. 107 says that a lease for any term can be made only by a registered instrument and no delivery of possession is necessary. S. 108-A (*b*) says that the lessor is bound to put the lessee in possession of the property only *at the lessee's request* so that delivery of possession is not a necessary part of the transaction of a lease in India. Where the land is in possession of a trespasser, the owner can lease the land to a lessee and the lessee can file a suit to recover it. S. 111 says: "A lease of immoveable property determines by implied surrender." But I do not see why where there are two leases to the same person the surrender of the first lease should be implied. Even where the leases are of the same kind, they are overlapping and the terms of the second are somewhat inconsistent with the terms of the first, all that is necessary to imply is a cancellation of the first, only for the period which is overlapped by the second. In the present case even assuming that the mining lease is not totally inconsistent with coffee plantation, it seems to me that all the necessary implication is a cancellation of the first lease for a period of 36 years and no more. All the passage in the references relied on by the learned vakil for the appellant seem to refer to leases of the same kind and it is admitted by him that there is no case available where the second lease is of a different kind from the first. It is an *a fortiori* case where the second lease is of a different kind. On this point I need not deal with the case in detail as it has been discussed by my learned brother with whose conclusion I agree, viz., that the two leases are of an entirely different kind. Clause 54 of the documents, Exs. A and I, which are practically identical, seem to imply that the 20 acres covered by the second lease was not necessarily excluded from the first lease. Clause 7 relied on by Mr. Ramachandra Aiyar no doubt seems at first to support his contention; but all that it says is that in the case of eviction by the lessor compensation shall not be payable. Under what circumstances such an eviction is going to happen the clause does not state, and there is nothing to compel us to infer that the eviction should necessarily be under the terms of the second lease and

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irrespective of the conditions of the first lease. I do not think therefore that clause 7 necessarily supports the appellant.

The English Law seems to have been laid down in very wide terms. It is sometimes said that even if the intention of the parties is not to cancel the first lease, the law will imply a surrender. This does not seem to have been adopted in America, and I do not see why such a rule of law should be adopted in India.

For all these reasons I agree to the order proposed by my learned brother.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE KRISHNAN.

P. M. A. Muthiah Chettiar (dead) and another ... *Appellants** (*6th Defendant and his L. R.*)

v.

Venkatasubbarayulu Naidu (minor) by next friend and mother Manikya Kanniamma (declared a major—*vide* Order dater 19th March, 1924, on C. M. P. No. 3367 of 1923) and others ... *Respondents* (*Plaintiff and defendants* 3 *to* 5, 9 *to* 21, 24, 25, 26 *to* 41, 43 *to* 46, 49, 50, 52, 53, 55 *to* 61, 63 *to* 75, 77, 78 *to* 87 *and* 89 *and L. Rs. of* 5*th*, 12*th*, 14*th*, 65*th and* 64*th defendants supplemental Respondent and L.R. of* 9*th defendant*)

Muthiah Chettiar v. Venkatasubbarayulu Naidu.

Limitation Act—Art. 132—Mortgage—Suit to enforce—Limitation—Starting point—Default clause in deed giving mortgagee liberty to sue for whole amount of principal and interest in default of payment of interest—Effect—Waiver of default clause—Mortgagee's right of.

The suit was brought in 1916 to enforce a mortgage deed dated 20th September, 1890. The mortgage money was not payable under the deed until 1904. There was also a clause in the deed that in default of payment of interest the mortgagee was to be at liberty to recover the whole amount, principal and interest, up to that date.

Held, on a construction of the default clause, that the option was reserved with the mortgagee to enforce the clause at his pleasure ; and that the period of

*Appeal No. 389 of 1919. 8th January, 1925.

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limitation for the suit started to run, not from the date of the first default, but from the date on which the money became due under the terms of the main contract, namely 1904, under Art. 132 of the Limitation Act.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Vellore in O. S. No. 18 of 1918.

A. Ramachandra Aiyar for appellants.

A. Krishnaswami Aiyar, T. Kumaraswamiah, S. Ramaswami Aiyar and *S. Krishnaswami Aiyangar* for respondents.

The Court delivered the following

JUDGMENT :—The only question that arises in this appeal is one of limitation. The suit is brought on a mortgage deed dated 20th September, 1890, in 1916, the mortgage money not being payable under the deed until 1904. There is also a clause in the deed that in default of payment of interest the whole amount, principal and interest, up to that date should become due. It is argued before us in the first place that this default clause leaves no option to the mortgagee as to whether he shall or shall not enforce it ; but on a consideration of the language of the document which is translated in this Court as follows :—"If I should fail to pay. . .you shall be at liberty to recover," it is clear that the option is reserved with the mortgagee to enforce this clause at his pleasure. That being so, the question is whether the period of limitation started to run on the date of default, or when the money became due under the terms of the main contract, namely 1904, under Art. 132 of the Limitation Act. The view that the money becomes due within the meaning of this Article at the date of the first default has been adopted by the Allahabad High Court in *Gaya Din* v. *Jhumman Lal*(1) ; and that decision has been followed in two subsequent cases in *Nathi* v. *Tursi* (2) and *Collector of Jaunpur* v. *Jamna Prasad* (3). The case in *Gaya Din* v. *Jhumman Lal*(1) has been considered by this Court in *Narna* v. *Ammani Ammal* (4) in which a Division Bench took a view different from that of the Allahabad High Court and that view has subsequently been followed in *Ramadh Bibi Ammal* v. *Kandaswami Pillai*(5), *Lachakkammal* v. *Sokkayya Naick* (6), *Kaliappa Nadar* v. *Sami Aiyar* (7) and *Appayya* v. *Venkataramayya* (8) and to one or other of those cases we both have been parties.

1. (1915) I L R 37 A 400 (F B).
2. (1921) I L R 43 A 671.
3. (1922) I L R 44 A 360.
4. (1916) I L R 39 M 981 : 31 M L J 865.
5. (1917) 9 L W 479.
6. (1918) M W N 586.
7. (1921) M W N 384.
8. (1924) 20 L W 620.

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There is no definite pronouncement of the Privy Council on this point, although there is a dictum in support of the view taken in this Court in *Juneswar Das* v. *Mahabeer Singh* (9) the other cases of the Privy Council cited before us namely *Kishen Narayan* v. *Pala Mal* (10) and *Mahomed Hafiz* v. *Mahomed Zakariya* (11) are decisions under O. 11, rule 2 of the Code of Civil Procedure, and are not authorities on this point. In this state of affairs we prefer to follow the course of decisions in this Court in preference to the view of the Allahabad High Court ; and consequently, this appeal must

The balance of Rs. 50 due to the Court-guardian will be respondent.

In this view it is unnecessary to decide the further point upon which the Lower Court relies, namely that the limitation was saved by reason of the acknowledgment of the debt.

The balance of Rs. 50 due to the Court guardian will be paid by the appellant.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. VENKATASUBBA RAO.

M. K. Muhammad Batcha Sahib ... *Appellant** (*not a party in the first Court—3rd appellant in the Lower Appellate Court*)

v.

Arunachellam Chettiar ... *Respondent* (*Plaintiff*).

Muhammad Batcha Sahib v. Arunachellam Chettiar.

Evidence Act, S. 115—Vendees prior and subsequent—Estoppel between—Prior vendee inducing subsequent vendee to believe that, notwithstanding prior sale-deed, vendor continued to be owner and to purchase property in that belief—Prior vendee if estopped from claiming priority under his sale-deed.

On 1st August, 1919, the 1st defendant executed a sale-deed in respect of the suit property in favour of the 2nd defendant. On 10th September, 1919, the 1st defendant executed a sale-deed in respect of the same property in favour of the plaintiff. The question for decision was whether the 2nd defendant was estopped from relying upon his prior sale-deed to defeat the rights of the plaintiff under his later sale-deed.

The facts were that the 1st defendant with the concurrence of the 2nd defendant agreed on 5th September, 1919, to sell the property to the plaintiff, that an agreement of sale was accordingly executed, and that the 2nd defendant, giving up his rights under his own conveyance, attested the agreement to sell. Misled by the conduct of the 2nd defendant the plaintiff took a sale-deed

* S. A. No. 834 of 1922. 2nd February, 1925.

9. (1875) I L R 1 C 163 (P C). 10. (1922) 44 M L J 123 (P C)

11. (1921) I L R 44 A 121 : 42 M L J 248 (P C).

on the 10th September, 1919 and got it registered on the 11th. The 2nd defendant, whose sale-deed was not registered immediately, ignoring what had happened and with the fraudulent object of enforcing the sale in his own favour, presented his conveyance for registration on 13th September, 1919 and got it registered on 20th October, 1919.

Held, that the 2nd defendant's conduct amounted to a representation that, although he took a conveyance, the 1st defendant remained the owner of the property, and that as the plaintiff had been misled into taking a conveyance by reason of such conduct, the 2nd defendant was estopped from denying that he acquired a valid title under his conveyance as against the 2nd defendant.

Second Appeal against the decree of the District Court of Coimbatore in A. S. No. 65 of 1921 preferred against the decree of the Court of the Additional District Munsif of Coimbatore, in O. S. No. 957 of 1919.

C. S. Venkatachariar and *K. G. Babu Rao* for appellant.

T. M. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The facts are complicated and as the Munsif has set them out clearly in his judgment, I do not propose to state them again. The 1st defendant was the owner of the property in dispute. On the 1st of August 1919, she executed a sale-deed in favour of the 2nd defendant (Ex. II). On the 10th of September, 1919, she executed a sale-deed in favour of the plaintiff (Ex. C). The contest is now between the plaintiff and the 2nd defendant. The question is shortly, whose sale-deed is to prevail ?

The conveyance in favour of the 2nd defendant being earlier in date would in the ordinary course take precedence. On behalf of the plaintiff it is urged that the conduct of the 2nd defendant created an estoppel and that he is precluded from relying upon his sale-deed. The 2nd defendant treated the sale in his favour as cancelled, but under S. 92 of the Indian Evidence Act the subsequent agreement rescinding the sale cannot be proved. The question then is, did the 2nd defendant by any representation or by conduct amounting to representation induce the plaintiff to purchase the property parting with valuable consideration ? The effect of the finding of the Courts below is that the conduct of the second defendant was of an unequivocal character and that the plaintiff was thereby misled. This is a question of fact and the finding must be accepted in second appeal. Even apart from this, I am satisfied that the finding is correct. It is unnecessary to narrate the circumstances which give rise to the plea of estoppel. The outstanding facts that are relied upon by the plaintiff in this

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connection are, that the first defendant with the concurrence of the second defendant agreed on the 5th of September to sell the property to the 7th defendant, that an agreement of sale was accordingly executed and that the second defendant, giving up his rights under his own conveyance, attested the agreement to sell. The second defendant thus held out that the sale in his own favour was inoperative, that the first defendant still continued to be the owner of the property, that she had authority to dispose of it and that the second defendant was willing that the property should be dealt with as if it was at the absolute disposal of the first defendant. In short, the second defendant's conduct amounted to a representation that although he took a conveyance, the 1st defendant remained the owner of the property. The Courts below have also held disbelieving the plaintiff himself on this point, that he was induced to purchase the property by his conduct on the part of the 2nd defendant. I agree with this conclusion. Can the 2nd defendant now turn round and say that he was on the date of the sale to the plaintiff, the owner of the property? I think not. In *Sarat Sunder Dey* v. *Gopal Chunder Laha* (1), their Lordships of the Judicial Committee made the following observations :—

"What the Law and the Indian Statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it."

Their Lordships quote the following passage from the judgment of Lord Chancellor Campbell in the case of *Cairncross* v. *Lorrimer* (2) :—

"The doctrine will apply, which is to be found, I believe, in the laws of all civilised nations, that if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct."

Their Lordships also held that the terms of S. 115 of the Indian Evidence Act did not enact as law in India anything different from the law of England on the subject of estoppel.

1. (1892) I L R 20 C 296 (P C). 2. (1860) 3 Macq. H L C 829.

I am clearly of the opinion that the 2nd defendant cannot be allowed to deny that the 1st defendant was the owner of the property and was competent to dispose of it. I may observe that we are not concerned with the 7th defendant who does not put forward any claim.

For the appellant, it was strenuously argued that to give effect to the doctrine of estoppel would be tantamount to abrogating S. 92 of the Indian Evidence Act. I cannot follow this argument. I am not asked to admit evidence of any subsequent agreement to rescind the original sale. Under S. 92 the existence of such agreement cannot be proved. The question would arise in this way under that section. If the 2nd defendant proves by the production of the sale-deed that he is the owner of the property, no evidence can be given of a subsequent oral agreement on his part to rescind the sale. But, in the present case, the plaintiff does not rely upon any subsequent agreement. What he says in effect is, the 2nd defendant's conduct amounted to a certain representation and he acted upon it. Did he or did he not make that representation? That is the point to be decided. If he did make the representation and the plaintiff was misled by it and acted upon it, estoppel can be successfully pleaded. The Court is not called on to look at the conveyance in favour of the 2nd defendant at all. It is not in the least degree concerned with it. Neither is it necessary to look at the sale-deed nor to admit evidence of an agreement to rescind the sale. In fact the issue which the Court will have to decide is whether or not a representation was made. Consideration pertaining to the sale deed are extraneous to this issue. Until the question of estoppel is decided against the plaintiff, there will arise no occasion to consider the applicability of S. 92 of the Indian Evidence Act. I find absolutely no conflict between Ss. 92 and 115. The case in *Pichammal* v. *Ponnambala Bhattar* (3) cited by the appellant's learned vakil is distinguishable and the observations relied on are *obiter*. There is another way of looking at the question. When a party seeks to give evidence of a subsequent oral agreement modifying the terms of the written grant, he puts forward that agreement as true and relies upon the truth of that agreement. In the case of an estoppel, the party who pleads it does not profess to show that the representation made is true. On the contrary his case very probably is that

3. (1912) 15 I C 326.

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the representation is false but that the person who made it should not be allowed to show that it is false. Ss. 92 and 115 deal with two entirely different topics and I am unable to discover any conflict between the two.

In dealing with the question whether a transaction amounted to a sale or a mortgage, Melvill, J., in the course of his judgment in *Baksu Lakshman* v. *Govinda Kanji* (4) observed thus :—

"If the holder of an absolute bill of sale were not only to allow the vendor to remain in possession, but were to take interest from him on the alleged purchase-money, or allow him to go on improving the property, I conceive that any Court would hold that the so-called/vendee was estopped from endorsing his bill of sale. The answer to him would be, not that his conduct was evidence of an oral agreement converting the sale into a mortgage, but that, whether there has been such an agreement or not, he had by his conduct led the defendant to believe that he would treat the transaction as a mortgage, and that, on the strength of such belief, the defendant had been induced to pay money which he would not otherwise have paid, and that under such circumstances the plaintiff was estopped from denying that the original transaction was one of mortgage. In such a case it is clear that evidence of conduct would be strictly admissible under S. 115 of the Indian Evidence Act."

It has been suggested by the appellant's vakil that the view of Melvill, J., was overruled in *Maung Kyin* v. *Ma Shwe La* (5), and that therefore the passage extracted above from his judgment cannot be taken as stating the law correctly. Whatever may be the later view of the law on the point expressly decided by Melvill, J., I cannot agree that the particular passage referred to above does not correctly state the rule of estoppel.

I am clearly, therefore, of the opinion that the plaintiff must succeed on the question of estoppel.

The case may be considered from still another point of view. The 2nd defendant's conveyance was executed on the 1st of August, 1919, but was not immediately registered. Misled by the conduct of the 2nd defendant, (conduct to which I have already referred), the plaintiff himself took a sale-deed on the 10th September and got it registered on the 11th. The 2nd defendant ignoring what had happened and with the fraudulent object of enforcing the sale in his own favour, then presented his conveyance for registration on the 13th of September and got it registered on the 20th of October. The effect of registration is to confer validity on the document from the date of its execution. Is

4. (1880) I L R 4 B 594. 5. (1917) I L R 45 C 320 : 33 M L J 648 (P C).

the 2nd defendant then to be allowed to rely upon his own fraudulent conduct to give his conveyance preference over the sale deed of the plaintiff executed later but registered earlier ? For this reason also, the plaintiff is entitled to succeed.

There is just a minor point which has been raised by the appellant and relates to the discussion of the Issue III in the Munsif's judgment. The 2nd defendant admittedly paid Rs. 350 and he will be entitled to that sum. Rs. 350 will be accordingly substituted for Rs. 227-3-7. The judgment of the Lower Appellate Court will be modified to that extent. The Second Appeal in other respects fails and subject to the modification above is dismissed with costs.

This Second Appeal having been posted again to be spoken to this day the Court delivered the following

JUDGMENT:—The Second Appeal is now posted for being spoken to. There is no objection to the Second Appeal being dismissed without any reservation of the nature contained in the last paragraph of my judgment.

The Second Appeal is therefore dismissed with costs.

A. S. V. *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

Vuppulury Somasundaram ... *Appellant* (Appellant in Second Appeal No. 693 of 1921 on the file of the High Court—Plaintiff)*

v

Bhimisetti Kondayya ... *Respondent (Respondent in do.—Defendant).*

Execution sale—Purchaser's title to property purchased at—Judgment-debtor's right to dispute, on the ground that the property was at that date inalienable—Judgment-debtor aware of attachment and sale but not objecting to same—Right to dispute title subsequently—Order confirming sale—Effect.

P, the owner of an unenfranchised inam, mortgaged it to the defendant. The inam, which was even then unenfranchised, was subsequently sold in execution of a money decree obtained against P, and was purchased by the plaintiff's vendor. The inam was subsequently enfranchised, and, after its enfranchisement, was sold by P to the defendant.

In a suit by the plaintiff to redeem the mortgage in favour of the defendant, the latter pleaded that, as the property was inalienable on the date of the Court sale at which the plaintiff's vendor purchased, plaintiff's vendor and

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*L. P. A. No. 63 of 1924. 12th March, 1925.

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plaintiff acquired no valid title to the property which entitled plaintiff to redeem the suit mortgage. P had notice of the execution proceedings which culminated in the Court sale at which the plaintiff's vendor purchased, and, though P had an opportunity to object to the attachment and the sale, he did not do so.

Held, that P and his representative, the defendant, were precluded from contending that the property was at the date of the Court sale inalienable, and that plaintiff acquired no valid title to the property by means of such sale.

The effect of the order confirming the Court sale was that the property could be sold. And P, having been a party to the order confirming the sale, the order is binding on him, and it must be deemed that there is an adjudication that the property can be sold.

Appeal under cl. 15 of the Letters Patent against the judgment of Mr. Justice Krishnan, dated 18th February, 1924, in Second Appeal No. 693 of 1921 on the file of the High Court, preferred against the decree of the District Court of Vizagapatam in A. S. No. 469 of 1918, presented against the decree of the Court of the District Munsif of Yellamanchilli in O. S. No. 244 of 1917.

C. Rama Rao for appellant.

K. Venkatarama Raju for respondent.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS:—*Venkatasubba Rao, J.* :—This is a Letters Patent Appeal from the judgment of Krishnan, J. I shall briefly state the facts before discussing the question of law that arises. Perumal was the owner of the property and he mortgaged it to the defendant. It was then an unenfranchised inam. In execution of a money decree obtained against Perumal the property was subsequently sold in Court auction. Even then it was an unenfranchised inam. The plaintiff's vendor became the purchaser at the Court sale.

This suit has been instituted to redeem the mortgage in favour of the defendant. The defence is that the sale conveys to the plaintiff no title, the property having been inalienable. The defendant has had to concede that on this hypothesis the mortgage in his favour is also invalid. He, however, relies upon a sale made to him of the property by Perumal subsequent to the enfranchisement of the property.

These facts cannot be disputed : first, the property was inalienable on the date of the Court sale and consequently no valid title passed to the plaintiff ; secondly, by reason of the subsequent enfranchisement, Perumal acquired a right which could be transferred and the defendant, having then purchased

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the property from the owner, acquired a good title. Krishnan, J, relying on these facts has dismissed the plaintiff's suit. In my opinion, the question is not what are the true facts, but what is the effect of the Court sale; in other words, can Perumal or the defendant who claims through him plead that the property was in fact inalienable on the date of the Court sale? If Perumal is precluded from pleading that the land was inalienable, the defendant who claims through him is equally barred.

It was not disputed before Krishnan, J., that Perumal, the judgment-debtor, was aware of the execution proceedings that culminated in the sale and the argument apparently proceeded on the footing that though he had knowledge, he did not object to the attachment and sale. The plaintiff's learned vakil before us suggested that as a matter of fact Perumal put in a petition objecting to the sale and that his objection was overruled by the executing Court which thereafter ordered the sale of the property. The petition of Perumal and the order made thereon were not relied on in any of the Lower Courts or before Krishnan, J. We did not think it necessary to decide whether this additional evidence should be received or not; for, in our opinion, it is immaterial whether an objection was put forward which was overruled or whether the judgment-debtor having knowledge of the proceedings refrained from objecting. I therefore proceed to deal with the case on the footing that Perumal had notice of the proceedings and had an opportunity to object to the attachment but did not put forward any objection.

The Court sale was held on the assumption that the property could be sold. Is Perumal or his representative, the defendant, now to be permitted to show that this assumption was wrong and that in fact the property was inalienable? In my opinion there is a preponderance of authority in favour of the position that he ought not to be so permitted.

The first case I shall refer to is *Sheikh Murullah* v. *Sheikh Burullah* (1). In execution of a decree against the defendant, his property was sold and a stranger became the purchaser. The latter transferred his right to the plaintiff and he brought the suit for possession. The defendant raised the objection that the holding was non-transferable by custom and the sale was therefore bad. Mitra, J. held that the defendant could

1. (1903-5) 9 C W N 972.

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have objected to the attachment under S. 244 and he not having done so, was precluded from resisting the purchaser after confirmation of the sale. The learned Judge observes : "As between the purchaser and himself (the defendant) the title to the property vested in the purchaser on the confirmation of sale." Mitra, J. lays emphasis on this aspect, namely, whether the judgment-debtor had knowledge of the execution proceedings that culminated in the sale. If he had, he would be concluded by the order confirming the sale. If he did not have knowledge, it would be open to him to object to the sale in subsequent proceedings. Mitra, J. refers to *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2), where what was apparently a contrary view was taken, namely, that the defendant could resist a purchaser although he had not objected to the attachment under S. 244. This case was distinguished on the ground that no question was raised in it as to the effect of the knowledge on the part of the defendant of the execution proceedings leading to the sale. In *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (3), referred to with approval by Mitra, J., the learned Judges were of opinion that knowledge on the part of the debtor was decisive of the question. To quote their words : "If this question (whether the judgment-debtors were aware of the proceedings or not) be answered in the affirmative, then we are clearly of opinion that it is not open to them now to question the propriety of the sale that has already taken place." The view of Mitra, J., was affirmed in Letters Patent Appeal by Maclean, C. J., and Pargiter, J., who expressly followed *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (3).

This point was again considered in *Dwarkanath Pal* v. *Tarini Sankar Ray* (4). The facts were similar to those in *Sheikh Murullah* v. *Sheik Burullah* (1) and the learned Judges accepting the law as laid down by Mitra, J., express the view that *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2) had been sufficiently dealt with by that learned Judge in his judgment.

Lala Ram v. *Thakur Prasad* (5) is also a direct authority on the point. The facts are again similar to those in *Sheikh Murullah* v. *Sheik Burullah* (1) and the same view of the

1. (1903-5) 9 C W N 972.
2. (1897) I L R 24 C 355.
3. (1899) I L R 26 C 727.
4. (1907) I L R 34 C 199.
5. (1918) I L R 40 A 680.

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law was again taken. The principle is stated thus :—" As between him (the judgment-debtor) and the auction purchaser the sale has become conclusive and the auction purchaser has acquired a vested interest in the property sold." Here again the learned Judges advert to the fact that the judgment-debtor was aware of the execution proceedings and did not object.

The principle underlying these four cases, namely, *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (3), *Sheik Murullah* v. *Sheikh Burullah* (1), *Dwarkanath Pal* v. *Tarini Sankar Ray* (4) and *Lala Ram* v. *Thakur Prasad* (5) I may state thus : Under O. 21, R. 92, Civil Procedure Code, where no application is made to set aside a sale or where such application is made and disallowed, the Court is bound to make an order confirming the sale and it thereupon becomes absolute. Under S. 65 where property is sold in execution of a decree and the sale has become absolute, the property vested in the purchaser. If the judgment-debtor objects under S. 47 to the sale and his objection is overruled he is bound by the decision of the executing Court. If being aware of the execution proceedings and having an opportunity to object, he fails to do so, he is likewise bound by the order confirming the sale, in other words, he is, in effect, in either case a party to the order by which the sale is confirmed equally with the auction purchaser, and he cannot get behind it.

In my opinion, this is the right principle and I am prepared to follow the four cases mentioned above.

I have dealt with cases from which a definite principle is deducible. There are some other rulings which also negative the right of the judgment-debtor but which state the principle differently. Before discussing these cases, I may refer to *Pandurang Balaji* v. *Krishnaji Govind* (6), which is identical with the four cases cited above excepting that it makes no reference to the knowledge or want of knowledge on the part of the judgment-debtor although it decided that he was barred from contending in the suit that the sale was bad.

In *Gokulsingh Bhikaram* v. *Kisen Singh* (7) the plaintiff was the purchaser at the Court-sale and the defendants were the judgment-debtors in the previous suit. They had not

1. (1903-5) 9 C W N 972.
3. (1899) I L R 26 C 727.
4. (1907) I L R 34 C 199.
5. (1918) I L R 40 A 680.
6. (1903) I L R 28 B 125.
7. (1910) I L R 34 B 546.

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objected in the execution proceedings to the attachment and sale. Could they now object ? It was held, they could not. The reason is given thus :—

> "Though an auction-purchaser at a Court-sale in execution of a decree is not a party to the suit in which the decree was passed and though he is not a representative of either the decree-holder or the judgment-debtor for the purposes of S. 244, yet if the question raised by the judgment-debtor as to the legality of the Court-sale is virtually one between the parties to the suit, and it in the decision and result of that question the auction-purchaser is interested, the judgment-debtor ought not to be allowed to attack the sale in a suit."

The learned Judges seem to think that the result of setting aside the sale would affect a party to the previous suit and the question was thus one virtually between the parties to that suit and ought to be decided under S. 244. (*See* p. 552 last sentence).

In *Nadamuni Narayana Aiyangar* v. *Veerabhadra Pillai* (8) the plaintiff was the judgment-debtor in the previous suit. He sued to get the sale held in execution of the decree against him, annulled. Wallis, J., as he then was, observes that the plaintiff is barred from bringing the suit not by reason of S. 244 but by reason of general grounds of policy which underlie that section. Krishnaswami Aiyar, J. states the principle in a different way, for, according to him, the only mode in which the sale can be impeached is by an application to the executing Court to set aside the sale. In his opinion, unless a sale is set aside in the proceedings between the parties, the suit against the purchaser is not maintainable. With great respect, I am unable to understand the ground of the decision of Krishnaswami Aiyar, J.

It is, however, unnecessary to pursue this point further, as, in my opinion, as I have stated the right principle is that which underlies the decision in *Sheikh Murullah* v. *Sheikh Burullah* (1) and the other three cases which I have mentioned above.

In *Venkataramanachariar* v. *Meenakshisundaram Aiyar* (9) a Bench of this Court approve of *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2). But I am not prepared to say that the learned Judges have taken a different view from that taken in the later Calcutta cases to which I have referred. In my opinion, it must be taken that *Bhiram*

1. (1903-5) 9 C W N 972. 2. (1897) I L R 24 C 355.
8. (1910) I L R 34 M 417 : 21 M L J 928. 9. (1908) 19 M L J 1.

Ali Shaik Shikdar v. *Gopi Kanth Shaha* (2) was understood by this Bench in the way it was by Mitra, J., in *Sheikh Murullah* v. *Sheikh Burullah* (1).

It was strenuously contended by the learned vakil for the respondent that whereas the judgment-debtor as a plaintiff cannot impeach the sale, he may as a defendant resist the suit. This distinction is artificial and I can find no justification for it. The case that was most relied on for this proposition *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2) cannot any longer be regarded an authority in support of it. It is true that Miller, J., in *Thathu Naick* v. *Kondu Reddi* (10) accepts this proposition, but on the facts of the case his observations seem to be *obiter*, for, Sankaran Nair, J., the third Judge to whom the case was referred, on a difference of opinion between Miller and Abdur Rahim, JJ., points out at p. 252 that the judgment-debtors were not aware before the confirmation of the sale of the facts which were sought to be relied on to invalidate the sale. There is nothing in this case to suggest that the principle on which *Sheikh Murullah* v. *Sheikh Burullah* (1) rests is not sound.

It was next contended that the sale of an unenfranchised inam is absolutely void and the plaintiff's suit should on that ground be dismissed. I cannot follow this contention. As I have said, we are not here concerned with the true facts of the case but only with the result of certain proceedings. Is the defendant to be permitted to plead that the land was inalienable at the time of the Court-sale? The effect of the order confirming the sale is that the land can be alienated. The order is conclusive, and it must be deemed that there is an adjudication that the property can be sold. In this view, it is unnecessary to consider *Raja of Vizianagram* v. *Dantivada Chelliah* (11), *Sannamma* v. *Radhabhayi* (12), *Nazabari Sahu* v. *Siva Korithan Naidu* (13) and other cases cited on this point.

The appeal must therefore be allowed.

According to our judgment the plaintiff has become the owner of the property and this assumes that the defendant is not. The District Munsif though purporting to decide Issue I has really decided Issue II. We have now reversed

1 (1903-5) 9 C W N 972. 2. (1897) I L R 24 C 355.
10. (1908) I L R 32 M 242. 11. (1904) I L R 28 M 84 : 14 M L J 468.
12. (1917) I L R 41 M 418 : 34 M L J 17 (F B). 13. (1915) M W N 415.

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his decision on that Issue. Issues I, III and IV remain to be decided. The decision on the first issue is reversed and the suit is remanded to the District Munsif's Court for disposal in regard to the other Issues. The defendant will pay the costs incurred by the plaintiff in the first Court, the Lower Appellate Court and in this Court.

There will be refund of Court-fee on the memorandum of appeal in this Court and in the Lower Appellate Court.

Madhavan Nair, J.

Madhavan Nair, J. :—I have had the advantage of reading the judgment of my learned brother with which I agree. The facts of the case have been clearly stated in that judgment and they need not be re-stated here. The plaintiff is a transferee from the auction purchaser and his suit is to redeem a mortgage held by the defendant and subject to which the property was sold at the auction. The defendant pleads that the property being an inam land is inalienable and therefore the sale conveyed no title to the auction-purchaser and further, that subsequent to the auction sale the land was enfranchised by the Government in the name of the judgment-debtor, Perumal, and that he is now holding it as the purchaser from the said Perumal. The question for decision arising in these circumstances is whether it is now open to the defendant to put forward these pleas by way of resistance to the plaintiff's suit for redemption. It may be stated at the very outset that arguments have proceeded on the assumption that for the purposes of this case the defendant may be taken to represent Perumal, the judgment-debtor, and that he claims through him. It has also been assumed throughout the arguments that Perumal was aware of the execution proceedings and did not object to the same. It has also not been disputed that the defendant himself during the course of the execution proceedings put forward his mortgage interest and that the property was ordered to be sold subject to such interest.

The auction sale was held on the assumption that the property sold was alienable. Is it now open to Perumal or the defendant to plead that the property is inalienable? In my opinion the decision in *Lala Ram* v. *Thakur Prasad* (5), *Dwarkanath Pal* v. *Tarini Sankar Ray* (4) and *Pandurang Balaji* v. *Krishnaji Govind* (6) conclusively show that it is not

4. (1907) I L R 34 C 199. 5. (1918) I L R 40 A 680.
6. (1903) I L R 28 B 125.

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open to him to raise these contentions now. In *Lala Ram* v. *Thakur Prasad* (5) a house was sold by auction in execution of a decree obtained against the defendant in the case and was purchased by the plaintiff. When he failed to get actual possession, he instituted a suit for its recovery, but his claim was contended on the ground that the house was not liable to sale in view of the provisions of S. 60 (c) of the Code of Civil Procedure. The learned Judges held in the case that "after that sale and confirmation of sale, it was not open to the defendant at this stage to question the validity of the sale and the title which the plaintiff had acquired under it." In the course of their judgment, the learned Judges observe as follows :—

"Under O. 21, R. 92, after a sale has taken place and has been confirmed the auction-purchaser acquires a title to the property. In the present instance no objection to the sale was raised before it took place or at any time. It is not suggested in the pleadings that the defendant-judgment-debtor was not aware of the execution proceedings. As between him and the auction-purchaser the sale has become conclusive and the auction-purchaser has acquired a vested interest in the property sold................In the present case no objection having been taken and the sale having become conclusive as between the parties, it is not open, in our opinion, to the defendant after the lapse of so many years from the date of the sale to contend that the sale ought never to have taken place and conveyed no title to the purchaser."

This view is supported by the decision in *Dwarkanath Pal* v. *Tarini Sankar Ray* (4). In overruling the contention similar to the one raised in the present case the learned Judges in that case refer with approval to the opinion of Mr. Justice Mitra in *Sheik Murullah* v. *Sheik Burullah* (1) to the effect that "after a judgment-debtor, with a full knowledge of the execution proceedings and full opportunity of raising an objection to the effect that the holding was an occupancy holding and non-transferable, had failed to raise that objection at the time of the sale, it was not competent to him to resist the purchaser after the confirmation of the sale and that as between the purchaser and the judgment-debtor the title to the property vested in the purchaser on the confirmation of the sale." The apparently contrary opinion expressed in *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2) in favour of the view that the defendant could resist the auction purchaser's suit though he did not object to the attachment and sale had been sufficiently explained in the case in *Sheik Murullah* v. *Sheik Burullah* (1)

1. (1903-5) 9 C W N 972.
2. (1897) I L R 24 C 355.
4. (1907) I L R 34 C 199.
5. (1918) I L R 40 A 680.

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which has been referred to in *Dwarkanath Pal* v. *Tarini Sankar Ray* (4). The decision in *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2) has no doubt been mentioned with approval in two Madras cases, viz., *Venkataramanachariar* v. *Meenakshisundaram Aiyar* (9) and *Thathu Naik* v. *Kondu Reddi* (10), but as has been clearly pointed out in my learned brother's judgment there is nothing in these cases to suggest that the "principle on which *Sheik Murullah* v. *Sheik Burullah* (1) rests is not sound." The decision in *Pandurang Balaji* v. *Krishnaji Govind* (6) also supports the view put forward on behalf of the appellant. Applying the principle laid down in these cases, it follows that the defendant must be considered to be bound by the order confirming the sale in favour of the auction-purchaser and that it is now open to him to question the validity of the Court-sale in the present case.

The above conclusion is supported also by the decisions in *Gokulsingh Bhikaram* v. *Kisen Singh* (7) and *Nadamuni Narayana Aiyangar* v. *Veerabhadra Pillai* (8) which state that principle in a slightly different way. In *Gokulsingh Bhikaram* v. *Kisen Singh* (7) it was held that the judgment-debtors who had not objected in the course of execution to attachment and sale of the suit properties could not afterwards question the validity of the sale in a suit instituted by the auction-purchaser. The learned Judges observe thus :—

"Though an auction-purchaser at a Court-sale in execution of a decree is not a party to the suit in which the decree was passed and though he is not a representative of either the decree-holder or the judgment-debtor for the purposes of S. 244, yet if the question raised by the judgment-debtor as to the legality of the Court-sale is virtually one between the parties to the suit, and if in the decision and result of that question the auction-purchaser is interested, the judgment-debtor ought not to be allowed to attack the sale in a suit."

In *Nadamuni Narayana Aiyangar* v. *Veerabhadra Pillai* (8) the plaintiff (who represented the judgment-debtor in the prior suit) sued to set aside the sale of a temple office which was made in execution proceedings in favour of the defendant-auction-purchaser. It was held by Wallis, J., that he was precluded from bringing the suit by reason of "the general intention of legislature" as manifested in S. 244. The same

1. (1903-5) 9 C W N 972. 2. (1897) I L R 24 C 355.
4. (1907) I L R 34 C 199. 6. (1903) I L R 28 B 125.
7. (1910) I L R 34 B 546.
8. (1910) I L R 34 M 417 : 21 M L J 928.
9. (1908) 19 M L J 1. 10. (1908) I L R 32 M 242.

conclusion was arrived at by Krishnaswami Aiyar, J., who states the principle thus : "The auction-purchaser derives his rights from the sale which the party to the execution proceeding should not be permitted to impeach except by application to the executing Court." It seems to me that in all the above decisions which we have examined the learned Judges give effect to the broad principle that the proper place to raise objections to attachment and sale is the executing Court and that the judgment-debtor who has had notice of the execution proceedings must be deemed to be bound by the order passed in such proceedings confirming the sale in favour of the auction-purchaser. As already pointed out it follows therefore that the defendant is now precluded from raising his present contentions.

In the view it is not open to the defendant to plead that the suit land is inalienable inasmuch as he is bound by the order confirming the sale which amounts to an adjudication that the land can be sold, the question whether the sale of an unenfranchised inam is absolutely void does not strictly arise in this case and the decisions cited in support of that contention, viz., *Raja of Vizianagram* v. *Dantivada Chelliah* (11), *Sannamma* v. *Radhabayi* (12), *Nazabari Sahu* v. *Siva Korithan Naidu* (13) need not therefore be considered.

In the result, I agree that the decision of Krishnan, J., should be set aside and the case should be remanded to the Lower Court for disposal as pointed out by my learned brother. The defendants will pay the costs of the plaintiff up to date.

A. S. V. *Decree set aside : Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE KRISHNAN.

Angamuthu Mudaliar ... *Appellant** (*Plaintiff*)

v.

Ratna Mudaliar and others ... *Respondents* (*Defendants*)

Partition Act (IV of 1893), Ss. 2 and 3—Suit for partition—Consent order directing sale—Subsequent application claiming to buy property at a valuation—S. 3 if applies to the case—"Such shareholders"—Meaning of.

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*O S A No. 121 of 1922. 23rd March, 1925.

11. (1904) I L R 28 M 84 : 14 M L J 468.

12. (1917) I L R 41 M 418 : 34 M L J 17 (F B).

13. (1913) M W N 415.

Angamuthu Mudaliar *v.* Ratna Mudaliar.

In a suit for partition among the co-parceners in a joint Hindu family, a consent order was passed that the property in the suit, a house, should be sold under the Partition Act. The plaintiff thereafter applied under S. 3 of the Act claiming to buy the property at a valuation fixed by the Court. *Held,* S. 3 cannot be applied after the Court had already directed a sale. The proper time to apply under S. 3 is before the Court makes an order under S. 2 and after the request had been made by one of the parties that the property should be sold. The words "such shareholders" occurring in the latter part of S. 3 (1) must necessarily mean the shareholder who applied for leave to buy.

On appeal from the order of the Hon'ble Mr. Justice Coutts Trotter, dated 2nd October, 1922, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 750 of 1919.

K. Jagannadha Aiyar for appellant.

V. S. Govindachari for respondents.

The judgment of the Court was delivered by

Krishnan, J.

Krishnan, J. :—This is an appeal against an order passed under the Partition Act IV of 1893. The plaintiff, who is the appellant before us, one of the co-parceners of a family consisting of three co-parceners, brought a partition suit for his share. When the decree was passed in that suit we find an order passed by the learned trial Judge by consent of parties that the property in suit, a house, should be sold under the Partition Act unless the Official Referee found it convenient to divide it by metes and bounds. This was a consent order. The Official Referee afterwards found that it was not convenient to divide the house into two halves and give one half share to the plaintiff and the other half to the defendants. It was therefore decided to sell the property under the Partition Act, but in the order made for this purpose, the learned Judge, Coutts Trotter, J., did not make it clear under what section of the Partition Act the sale was to take place. An application was subsequently made by the plaintiff under S. 3 of the Partition Act claiming to buy the property at a valuation fixed by the Court. This was disallowed by Coutts Trotter, J., but, on appeal to the Appellate Court, the late learned Chief Justice Sir Walter Salis Schwabe and Wallace, J., reversed that order and sent the case back to be disposed of according to law. In remanding the case they did not order that action should be taken under S. 3 of the Partition Act but simply directed that the case must be disposed of according to law.

It is clear to our minds that S. 3 of the Partition Act cannot be applied after the Court had already directed a sale

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Krishnan, J.

and in this case the sale was with the consent of all parties. The sale which was directed was a sale under S. 2 of the Partition Act. S. 3 begins by saying, "If, in any case where the Court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or the shares of the party or parties asking for a sale, the Court shall order a valuation." It seems to us, therefore, that the proper time to apply under S. 3 is before a Court makes an order under S. 2, and after the request had been made by one of the parties that the property should be sold. Unless we construe the two sections in this manner there will be much difficulty in applying them. Once a final order is made as between the parties that the property should be sold under S. 2 and that means a sale open to the public when anybody might bid for the property unless it is expressly restricted to be between the parties only no order can be made under S. 3, as it is too late then to apply under that section. S. 3 contemplates that, when the application is made by one of the parties to direct a sale of the property and before the Court makes the order, any other party who is entitled to a share in the property may at once apply for leave to buy at a valuation and when such an application is made, the Court is bound under the section to direct a valuation of the share of the party asking for sale and to find out what its proper value is, and the party who has offered to buy is entitled to buy that share at that valuation. If he fails to do so, his application would be dismissed and he will be made responsible for costs under cl. (3) of S. 3. Clause (2) provides for more than one party applying at the same time for leave to buy as provided in sub-section (1) of cl. (3). There is no difficulty in construing the section in this manner. We are not able to agree with the construction put on S. 3 by Coutts Trotter, J., where he says that when an application is made for buying by one of the shareholders, any shareholder can ask that the property should be sold to him at the valuation arrived at; if that view is taken, there will be no end of trouble between competing shareholders. It is clear that the shareholder who offers to buy and at whose instance the valuation is made by the Court is the person who is entitled to buy. The words "such shareholders" occurring in the latter part of cl. (1) of the section must necessarily mean the shareholder who applied for leave to buy. In this case S. 3 does not apply. The parties have

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already agreed that the properties should be sold under S. 2 and that consent has not been set aside by any order and is still in force.

One further difficulty in applying S. 3 in this case is that it is not shown that the defendant applied for the sale, for it is only then that his share can be valued and dealt with under S. 3. The fact seems to be that both parties were present at the time when the decree was passed and agreed to the sale being ordered and neither party actually made the application for sale. In these circumstances we direct that the property be sold by public auction under S. 2 of the Partition Act. Both parties will be at liberty to bid and set off their respective shares if they become purchasers. The public will also have a right to bid at the auction.

It was argued that the plaintiff should be compelled to adhere to the bid that he made once before to the Official Referee of Rs. 10,000 for this property ; but we think that that cannot be insisted upon, because the bid was made when it was not clear as to what the rights of the parties were.

The decree will be modified as above stated and the case will go back to the Official Referee for disposal in the light of the above observations. The appellant will pay to the respondent half of the taxed costs.

T. S. V. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE KRISHNAN.

P. M. A. M. Ramaswami Chettiar (minor)
by next friend, the 2nd appellant
and others ... *Appellants** (*Defendants*)

v.

Lodd Govindoss Krishnadoss Varu... *Respondent* (*Plaintiff*).

Ramaswami Chettiar v. Lodd Govindoss Krishnadoss.

Evidence Act, S. 92—Deed—Recital of consideration—Oral evidence to show it to be incorrect—If admissible—Opposite party if can let in oral evidence as to circumstances in which recital was made.

Where there is a recital in a document of the payment of a certain sum of money as consideration, oral evidence is admissible to prove that the recital is

*O. S. Appeal No. 31 of 1925. 29th April, 1925.

incorrect as a matter of fact. Such a recital being only an averment of fact, S. 92 of the Evidence Act does not bar oral evidence being let in to prove it to be wrong. In such a case, the other party must also be allowed to let in oral evidence to prove that the recital is not incorrect, but was deliberately put in and for the purpose of proving it, he must be allowed to prove what the real consideration was. S. 92 does not in any way bar such proof, for the proof is adduced not for the purpose of varying or altering any term of the written contract, but only to show that the recital in the deed is correct. *Sah Lal Chand v. Indarjit*, (1900) I L R 22 A 370 (P C) ; *Chunni Bibi* v. *Basanti Bibi*, (1914) I L R 36 A 557 followed.

Quaere : Whether the ruling in *Adityam Aiyar* v. *Ramakrishna Aiyar*, (1915) I L R 38 M 514 can be supported in the face of the ruling of the Privy Council in *Hanif-un-nisa* v. *Faiz-un-nissa*, (1911) I L R 33 A 340 (P C) ?

On appeal from the judgment and decree of the Hon'ble Mr. Justice Srinivasa Aiyangar, dated 3rd March, 1925, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 722 of 1920.

A. Krishnaswami Aiyar, *A. Ramachandra Aiyar* and *N. Chandrasekhara Aiyar* for appellants.

V. Radhakrishnayya for respondent.

The Court delivered the following

JUDGMENTS :—*Krishnan, J.* :—This suit has been disposed of by the learned Trial Judge on the pleadings without taking any evidence except filing a document. He held that S. 92 of the Evidence Act barred the defendant from adducing oral evidence of his plea, as he proposed to do.

Krishnan, J.

The plaintiff had assigned to one P. M. A. R. Muthiah Chettiar, whose legal representatives the respondents are, an 1|8th share of a mortgage decree which his father had obtained against the Rajah of Karvetnagar and others, plaintiff having succeeded to his father's rights on his death. A copy of the deed of assignment has been filed in evidence as Document No. 3159. The consideration for the assignment is recited in this deed as follows :—

"For a consideration of Rs 2,89,000 to be paid by Muthiah Chettiar to Lodd Govindoss (the plaintiff) whereof Rs 89,000 is paid in advance this day and the three promissory notes, dated 24th March, 1915, and 26th April, 1917, executed by Messrs. Tawker & Sons in favour of Muthiah Chettiar for Rs 1,50,000 together with the four jewels pledged as security by the said Tawker & Sons are assigned in favour of the plaintiff free from any claim by Muthiah Chettiar against Tawker & Sons and the balance of Rs. 50,000 being payable at any time before the end of February, 1918."

The deed is dated 1st October, 1917. In this case we are not concerned with the second and third items of considera-

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Krishnan, J.

tion but only with the first. The plaintiff alleges in this suit that the recital in the deed that Rs. 89,000 was paid is incorrect and that only Rs. 60,000 were paid and he seeks to recover the balance Rs. 29,000. The defendant conceded that only Rs. 60,000 were in fact paid but he pleaded that he was not liable to pay the balance. His contention amounts to an averment that the recital of payment in full of Rs. 89,000 was made in the deed deliberately and that there was no mistake about it and he wants to adduce oral evidence to show the circumstances in which that recital was made in the document. His case is that the real consideration agreed to be paid for the assignment was only Rs. 2,60,000 but that he agreed to consideration being stated to be nominally Rs. 2,89,000 on condition that a recital should be made in the deed that the whole of Rs. 89,000 was paid off though only Rs. 60,000 was in reality paid. In fact the recital of consideration in the deed as Rs. 2,89,000 was according to him closely connected with and dependent on the further recital of payment of Rs. 89,000 in full though only Rs. 60,000 was paid. The document, it will be noted, further says that the amount still due under it was only Rs. 50,000 confirming the previous recital. He pleads that all these recitals were made in the circumstances above stated and that he is not bound to pay the suit amount.

The learned Trial Judge relying on the decision of the Privy Council in *Sah Lal Chand* v. *Indarjit* (1) has allowed the plaintiff to go behind the recital of payment and to show that it is wrong as only Rs. 60,000 were actually paid, on the ground that such a recital was only an averment of fact and that it could be proved to be wrong by oral evidence, S. 92 of the Evidence Act not barring such proof. So far he is correct, but he has at the same time shut out the defendant from showing the circumstances in which the recital was made as he considered that it involved proof of a consideration different from the one recited in the deed and that such proof be parol evidence was barred by S. 92 as consideration is one of the terms of the contract.

I regret I am unable to follow his view on the second point. I am clearly of opinion that if one party is allowed to show by oral evidence that a recital in a document is incorrect in fact, the other party must certainly be allowed to show by

1. (1900) I L R 22 A 370 (P C).

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similar evidence that it is not incorrect and that the recital was deliberately put in and for the purpose of showing it he must be allowed to prove what the real consideration for the document was. S. 92 does not in my opinion bar such proof, for such proof is adduced not for the purpose of varying or altering any term of the written contract but only to show that the recital in it is correct. To shut out oral evidence for the purpose will be to allow a gross fraud to be perpetrated.

This question was discussed in *Chunni Bibi* v. *Basanti Bibi* (2) where the learned Judges of the Allahabad High Court laid down that if one party to a deed alleged and proved that whole of the consideration, the receipt of which was acknowledged in the deed, did not pass, the case fell within the proviso 1 of S. 92 and the other party was at liberty to show what the real consideration was and parol evidence could be given of the real nature of the transactions. What the first party tries to prove in such a case is failure of consideration and that brings it under proviso (1); the second party can then clearly prove in rebuttal of the first party's case that there was in truth no failure of consideration and for that purpose show what the real consideration was. As pointed out by the learned Judges in Allahabad, a party cannot both affirm and disaffirm the same transaction by showing its true nature for his own relief and by insisting on its apparent character to prejudice his adversary. This view is supported by the observation of the Privy Council in *Shah Mukhun Lall* v. *Baboo Sree Kishen Singh* (3) and also by the decision in several previous cases, namely, *Lala Himmat Sahai Singh* v. *Llewhellen* (4), *Kailash Chandra Neogi* v. *Harischandra Biswas* (5), *Nath Khan* v. *Sewak Koeri* (6) and *Hanif-un-nissa* v. *Faiz-un-nissa* (7). The last of these cases is a ruling of the Privy Council in which their Lordships had no difficulty in holding that what appeared on the face of the document to be a sale for a consideration might be shown to be in reality a gift and that parol evidence was admissible for the purpose. My learned brother, Srinivasa Aiyangar, J., refused to follow the ruling *Chunni Bibi* v. *Basanti Bibi* (2) on the ground that it was in conflict with the ruling of this Court in *Adityam Aiyar* v. *Ramakrishna Aiyar* (8). With respect, I think he is

2. (1914) I L R 36 A 537.
3. (1868) 12 M I A 157.
4. (1885) I L R 11 C 486.
5. (1900) 5 C W N 158.
6. (1911) 15 C W N 408.
7. (1911) I L R 33 A 340 (P C).
8. (1913) I L R 38 M 514: 25 M L J 602.

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Krishnan, J.

wrong. The Madras case was cited to the Allahabad Judges and they distinguished it, and I think rightly. There was no question in the Madras case of a recital in a deed being allowed to be shown to be incorrect by one of the parties. That ruling does not touch the principle of the Allahabad case. It may be open to doubt whether the Madras ruling can be supported in the face of the ruling of the Privy Council in *Hanif-un-nissa* v. *Faiz-un-nissa* (7) but that question we need not consider. In my view that case has no bearing on the case before us. I think the Allahabad decision embodies a sound principle and I am, with respect, prepared to follow it. No authority has been cited to us in which the correctness of that ruling has been doubted or challenged. Following it I would hold that this case should be tried on oral evidence and as the Trial Judge had excluded such evidence the case must go back to him for a fresh trial. I would allow the appeal and remand the case for a fresh trial. The respondent must pay the costs of this appeal. The other costs will be disposed of by the Trial Judge.

Kumaraswami Sastri, J. :—I agree.

T. S. V. *Appeal allowed ; case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

The Right Honourable the Secretary of State for India in Council represented by the Collector of Chingleput ... *Petitioner* in all the S. Rs.*

The Collector of Chingleput, *In re.*

Limitation Act, S. 12 (3)—Applicability—Leave to appeal to Privy Council—Time for obtaining copy of judgment—If can be excluded.

In the case of an application for leave to appeal to the Privy Council, the time requisite for obtaining a copy of the judgment appealed against may be excluded in calculating limitation. The expression "decree appealed from" in S. 12 (3) in the case of an application for leave to appeal really means "when a decree is sought to be appealed from".

Petitions under O. 45, R. 2 and under S. 109, cls. (*b*) and (*c*) and S. 110, Civil Procedure Code, sought to be presented to the High Court, praying that the High Court will be pleased to grant certificates enabling the petitioner herein to appeal to His Majesty in Council against the judgment of the High Court in S. A. Nos. 1356, 1355, 1354 and 1357 of 1921 pre-

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*S R Nos. 1226 to 1228 and 1231 of 1925. 16th April, 1925.

7. (1911) I L R 33 A 340 (P C).

The Collector of Chingleput, *In re.*

ferred against the decrees of the District Court of Chingleput in A. S. Nos. 400, 399, 398 and 401 of 1919 (O. S. Nos. 504, 503, 470 and 505 of 1918 on the file of the Court of the District Munsif of Poonamallee).

K. S. Sankara Aiyar for the *Advocate-General* for petitioner.

The Court made the following

ORDER :—The question for decision is whether in the case of an application for leave to appeal to the Privy Council time requisite for obtaining a copy of the judgment appealed against may be excluded in calculating limitation.

S. 12 of the Indian Limitation Act is now made applicable by the Privy Council rules to such applications, but the difficulty is that while sub-sec. (2) applies in terms to "an application for leave to appeal," sub-sec. (3) does not. But we think that, though sub-sec. (3) does not in terms apply, the language used in it really covers the present case. Under sub-sec. (2) when an application for leave to appeal is put in, the time requisite for obtaining " a copy of the decree appealed from " may be deducted. Here the phrase quoted really implies " a copy of the decree sought to be appealed from " as the decree cannot strictly be " appealed from " until leave to appeal has been given. There is no reason why the phrase " decree appealed from " when used in sub-section (3) should be given any different interpretation. Sub-section (3) therefore in the case of an application for leave to appeal really means " when a decree is sought to be appealed from....... " That is the present case and time requisite for obtaining a copy of the judgment may therefore be excluded.

That petition is also very reasonable, since a proper application for leave to appeal cannot be drawn up unless the party or his pleader has before him a copy of the judgment.

Authority on the point is scant. *Mahabir Prasad Tewari* v. *Jamuna Singh* (1) is direct authority though the reasons given are not those we have given. The case of *Anderson* v. *Periasami* (2) was under the old S. 12 in which " applications were limited to applications to appeal *in forma pauperis*," and therefore S. 12 could not be then called in aid at all.

We rule that time requisite for obtaining copy of judgment should be excluded.

T. S. V. *Prayer allowed.*

1. (1922) I L R 1 Patna 429.
2. (1891) I L R 15 M 169.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

Raja Velugoti Sri Govinda Krishna Yachendra Bahadur Varu ... *Petitioner** (*Plaintiff*)

v.

Mudumbi Srinivasa Ramacharlu (minor) by guardian M Venkataraghavacharlu and others ... *Respondents* (*Defendants* 1, 2 *and* 4 *to* 8).

Sri Govinda Krishna Yachendra Bahadur *v.* Srinivasa Ramacharlu.

Civil Procedure Code, O. 1, R. 3—Decision under the Survey and Boundaries Act—Suit by plaintiff—Various plots of land—Multifariousness.

The Survey Authorities decided by a single order under S. 13 of the Survey and Boundaries Act, 1897, that certain plots of land were not, as alleged by the plaintiff, within the boundaries of his proprietary village. The plaintiff filed one suit relating to all the lands challenging the order of the survey Authorities. *Held,* the suit was not bad for multifariousness, for if separate suits were brought with regard to the plots, a common question of fact, *i. e.,* whether the plot was within the plaintiff's village, would arise.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Chittoor dated 21st November, 1923, in O. S. No. 32 of 1922.

A. Krishnaswami Aiyar for petitioner.

Respondents were not represented.

The Court delivered the following

JUDGMENT :—The suit is filed against decisions of the Head Surveyor and Assistant Director of Survey under S. 13 of the Survey and Boundaries Act, 1897. The survey authorities decided that certain plots of lands were not as alleged by the plaintiff within the boundaries of the village of Inagaloor of which he is the proprietor. The Subordinate Judge has found the suit bad for multifariousness and put plaintiff to his election on the ground that the disputes are not connected with each other.. He also speaks of encroachments but I am unable to see any reference to such in the plaint. Now under the old Code it was held in *Doraiswami Pillai* v. *Muthuswami Mooppan* (1) that a suit might be brought against a number of purchasers of different items of land distrained and sold under the Rent Recovery Act as the cause of action, viz., the wrongful sale, was the same against all the defendants. So here in my opinion it is the decision of the survey authorities

*C R P No. 1136 of 1923. 23rd April, 1925.

1. (1903) I L R 27 M 94 : 13 M L J 479.

Kuppa-Mudaly, *In re.*

well as to the accused to have the deposition read over as soon as the examination of the witness is over. It would avoid a conflict between any recollection of the accused's pleader, the recollection of the prosecuting counsel and the recollection of the Court as well as the recollection of the witness, seeing there are four different persons to be considered in this connection, I think the provision of S. 360 (1) is not only a salutary provision but is a provision intended for the furtherance of justice. That being so, the procedure adopted by the Magistrate is an illegal procedure and I have no other course but that of setting aside the conviction and directing the Magistrate to retry the case.

T. S. V. *Conviction set aside and retrial ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Narayana Reddi and others ... *Petitioners** (*Accused*)

v.

Enumula Bojanna ... *Respondent* (*Complainant*).

Narayana Reddi *v.* Bojanna.

Criminal Procedure Code, S. 350—De novo *trial—What is—Object of—Recalling prosecution witnesses and cross-examining them—Effect of—Trial if vitiated.*

After a charge was framed in a case, the Magistrate was transferred and on the application of the accused a *de novo* trial was ordered. But the Magistrate merely recalled the prosecution witnesses and gave leave to the accused to cross-examine them. *Held,* it was not a *de novo* trial and the conviction must be set aside. *De novo* trial means a new trial from the beginning of the case. The object of granting a *de novo* trial is to enable the Magistrate who hears the case to see the way in which the witnesses give evidence before him, to mark their demeanour and thereby to be in a position to judge of their credibility.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-divisional Magistrate of Dharmavaram in Criminal Appeal No. 20 of 1924 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Kadiri in C C. No. 141 of 1924.

Imamuddin and *Rafiuddin* for petitioners.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER :—In this case an unfortunate error has crept in the procedure which has vitiated the trial. It resulted from

*Cr R C No. 756 of 1924
(Cr R P No. 635 of 1924). 24th April, 1925.

Narayana Reddi v. Bojanna.

the too frequent transfers of the Magistrates concerned in this case. The first Magistrate who tried the case framed the charge when he was transferred. When another Magistrate took up the case, an application was made to that Magistrate to order a trial *de novo* under S. 350, proviso (*a*) and that Magistrate ordered a *de novo* trial accordingly. But, before the trial began, that Magistrate was also transferred, and a third Magistrate, a new man, was appointed as the Sub-Magistrate of the place. When he took up the case for trial, his attention was drawn to the order passed by his predecessor granting a *de novo* trial ; but, instead of granting a *de novo* trial, what he did was merely to recall the prosecution witness and give leave to the accused's vakil to cross-examine those witnesses. This is not the meaning of "*de novo* trial." *De novo* trial means a new trial from the very beginning of the case. The object of granting a *de novo* trial is to enable the Magistrate who hears the case to see the way in which the witnesses give evidence before him, to mark their demeanour, and thereby to be in a position to judge of their credibility. That object is lost if the witnesses are not examined again but are only allowed to be cross-examined by the accused. Such a course is not in accordance with the provisions of S. 350, and in two cases to which my attention has been drawn, their Lordships have set aside the trial and ordered a new trial under similar circumstances. [See *Hnin Yin* v. *Than Pe* (1) and *Sobh Nath Singh* v. *Emperor* (2)]. In the latter case their Lordships of the Calcutta High Court went to the length of holding that even if no objection was taken to the course adopted, of merely allowing the witnesses to be cross-examined further, still the trial is vitiated. Here apparently the accused wanted to have the witnesses examined from the very first but that was not allowed by the Magistrate. This error in the procedure has vitiated the trial. I am, therefore, constrained to set aside the convictions of the accused in this case and direct them to be retried for the offences charged against them.

The papers will be sent to the Stationary Sub-Magistrate, Kadiri, for retrial of the case.

T. S. V. *Conviction set aside and retrial ordered.*

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1. (1916) 44 I C 337.
2. (1907) 12 C W N 138.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE KRISHNAN.

Commissioner of Income-tax, Madras... *Referring Officer**

v.

Chengalvaroya Chetti and another ... *Assessees.*

Commissioner of Income-tax, Madras *v.* Chengalvaroya Chetti.

Income-tax—Piecegoods—Fall in price of stock at the end of year—Estimation of loss—Balance of stock—Opening price for next year—Calculation of profit and loss—Reference under S. 66 of the Income-tax Act—Question—Frame of.

An assessee had a large stock of piecegoods at the beginning of 1921 which he bought at Rs. 13-8-0 a piece. At the end of the year of assessment, their value fell down to Rs. 6 a piece and in submitting his statement of accounts, he treated the stock on hand at the end of the year as being worth only Rs. 6 per piece and on that footing he was allowed to estimate his loss. In the next year he valued the stock left over again at Rs. 13-8-0 per piece initially and on that basis estimated his loss. *Held,* he was only entitled to put Rs. 6 per piece as the initial value of the stock for the purpose of calculating his profit or loss for the year beginning with 1922.

Per Krishnan, J. :—When a Judge directs the Commissioner of Income-tax to state a case for the opinion of the High Court under S. 66 of the Income-tax Act, the question should be so framed as to leave it to the Court which afterwards hears the reference to decide the matter on the facts stated by the Commissioner of Income-tax who makes the reference.

Case stated under S. 66 (3) of the Indian Income-tax Act by the Commissioner of Income-tax, Madras, in his Letter No. 1414 of 1924 and dated 15th October, 1924, in pursuance of the order of the High Court, dated 15th August, 1924, on the Mandamus Application of S. Chengalvaroya Chetti and S. Munuswami Chetti.

M. Patanjali Sastri for Referring Officer.

A. Suryanarayaniah for assessees.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS :—*The Chief Justice* :—This is a case in which my learned brother Kumaraswami Sastri directed the Commissioner of Income-tax to state a case for the opinion of the High Court under S. 66 of the Income-tax Act.

The learned Judge did something further which the section does not provide for ; he framed the question which he supposed to arise from the facts as set out in the Commissioner's report. With great respect to the learned Judge I do not think that the question he framed was the real question raised in the case, and I think that the question as he has fram-

*R. C. No. 16 of 1924. 22nd January, 1925.

Commissioner of Income-tax, Madras v. Chengalvaroya Chetti.

Coutts Trotter, C. J.

ed it is so beset with assumptions and begged questions that it would be impossible to decide fairly what the real point in this case is by any answer that could be given to the highly involved question he formulated.

The facts here are very simple. The assessees are a firm of piecegoods merchants in this City and they keep their books and render their accounts to the Income-tax Authorities in what is known generally as the mercantile system of accounts. It is obviously a very rough and ready method ; but it is the one that they have adopted and the one that the Income-tax Authorities are prepared to accept (provided they are satisfied with the honesty of the items set out) as giving sufficiently, for practical purposes, an accurate figure on which they can assess income-tax. The method is this : You set out on the debit side your opening stock and add to that the purchase of stock made during the year, you then set out on the contra side of the account the sales during the year and then you add to that the value of the stock on hand at the close of the year. Then, of course, you add to the debit side the establishment charges and the interest, if any, paid to creditors and so forth during the year. I should add that the accepted rule is that the assessee in crediting the closing stock figure is to take either the cost price or the market value whichever be the less—a provision obviously intended to be in favour of the trader and which enables him more evenly to distribute his loss.

Now for the year April 1921-22 an account was rendered on that footing and it showed a trading loss during the year of one lakh and accordingly these people were not assessed to income-tax at all. The loss arose in this way : they started their year with 12,570 pieces which were valued at what no doubt was taken to be the cost price, viz., Rs. 13-8-0 a piece, and at the end of the year there was left on their hands a balance of 7,573 pieces, and, in accordance with the then market rate, those pieces were valued down to Rs. 6 a piece. The result was a trading loss of just over a lakh and I ought to remark, because it has a bearing on what I am going to say later, that if those goods had been put down at Rs. 13-8-0 a piece, their cost price, there still would have been a trading loss of some Rs. 45,000 ; so that the assessees really stood to gain nothing if the figure of Rs. 6 was an undervaluation. Now comes the next year. In that year they start off their debit side to stock on the 13th of April, 1922, 7,573 pieces at

Rs. 13-8-0 a piece by which means they work out a loss of Rs. 15,000 and odd. The contention of the Income-tax Authorities is that the stock on the opening of the account must be put at the same value as it was put as stock left on hand on the other side of the previous year's account. That seems so obvious that one must scrutinize carefully what is said against it."

The question framed by the learned Judge ends up with the statement "whether he should be deemed to have made a large profit, while, as a matter of fact, he has incurred a large loss?" That begs so many questions that I really hardly know how to deal with it. The question is not whether a man has made a loss from the beginning to the end of his dealings with certain goods, but whether he has made a loss or a profit during the current year's trading, having regard to how he started and how he ended up. Of course, if you had to take it, that he could go on year in and year out writing off all this loss against the cost price, no matter how old the pieces left on hand, you might reach almost any result. What he does is this. He writes down at the end of the year his goods at the value at which they stand in the market, as he had to adopt the system of account in vogue. That gives him in certain cases a benefit —there is always a provision, which is intended for his benefit, that his losses in other branches can be set off. The principle, if it can be called a principle, contended for by the assessee would enable him, having cut his loss in one year, to go on claiming to deduct the same loss year in and year out and I cannot illustrate the absurdity of that better than by the hypothetical case that I put in the course of the argument. Supposing in the year 1921-1922 the assessee had underwritten his loss with a firm of underwriters—I believe there are underwriters who will guarantee trading losses and at the end of the year he goes to his underwriters and says :—I bought at Rs. 13-8-0 a piece; this stock was worth Rs. 13-8-0 a piece at the beginning of the year ; it is now worth Rs. 6 ; Rs. 7-8-0 is my loss; please pay me Rs. 7-8-0. I do not know what defence the underwriters would have to that claim. Suppose that he goes again next year to the underwriters with the same purpose of having his trading loss underwritten, what are the underwriters going to say if he says that the value of the same stock is Rs. 13-8-0 a piece ? The underwriters would say : We paid you yesterday a partial loss on the footing that these goods had deteriorated to Rs. 6 a piece, now you again value them

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at Rs. 13-8-0. Of course, the first observation is that no underwriter would accept such a valuation. If through accident or misapprehension as to the identity of the goods he got a second policy, and sued upon it, the defence of the underwriters would be "gross over-valuation," and to that defence it seems to me that the assured has no answer. He would be getting more than an indemnity. I cannot see that the principle is in the least different because you are dealing between the trader and the Government instead of between the traders and his underwriters. The question is, what in the proper mercantile sense is his loss or profit in the year? Appeals *ad misericordiam* are beside the point. The question is not so much of law but of business common sense. But there is a principle involved which determines the legal position, and I think the answer is clear that, as the value of the stock on the 13th of April, 1922, was in fact and in truth Rs. 6 a piece, the assessee is not entitled to reduce what are truthfully called his profits by putting the fictitious value of Rs. 13-8-0 a piece on the stock-in-trade merely because that was the sum he happened to pay for it before the year of assessment. In my opinion, to allow this to be done would be to let the assessee ascertain not his profit or loss, but to debit himself with the same loss on the same goods *in toto* for perhaps a course of years. That cannot be permitted. If these goods had been valued at Rs. 6 and the market had gone down to say Rs. 4 he would of course be entitled in this trading year to treat the difference between Rs. 6 and Rs. 4, *i.e.*, Rs. 2 as another loss justly debited to this year. But in the event of the price going up above the market rate at the beginning of the year which we must take as an accurate valuation, the difference is his profit.

In our opinion, the answer that we should return to the question is that the assessee, having elected in the previous year to value his stock at the market price of Rs. 6 a piece for the purpose of showing his trade loss during that year, is not entitled in the succeeding account to revert to the purchase price figure as representing the value of the goods, but is bound by the market price which he has fixed and been assessed on in the previous year unless he can show that he made a mistake as to the market value. Perhaps the simplest way of putting it is to say that the trader made a profit in this year, but it was not a profit sufficient to compensate him for his loss in other years.

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Krishnan, J.

Each party will bear his own costs in this Court. Costs in the Lower Court will be paid by the assessee to the Government as directed by the learned Judge ; vakil's fee Rs. 50 (Rupees Fifty).

Krishnan, J. :—I agree with what has fallen from my Lord the learned Chief Justice in this case except that I would add that the learned Judge who made the reference was not wrong in stating what in his opinion was the question of law that should be considered in this case, for a reference can be directed only on a point of law. It is difficult, however, to understand what exactly the learned Judge thought should be decided in this case. The question stated by him is put in such a form that, taking the hypothesis involved in it, it is impossible to give any answer except in the negative. That is not a fair way of framing a question. It should be so framed as to leave to the Court which afterwards hears the reference to decide the matter on the facts stated by the Commissioner of Income-tax who makes the reference.

The particular acse before us is a very simple one. The assessee had a large stock of piecegoods, 12,570 pieces, at the beginning of 1921 which he says he bought at Rs. 13-8-0 per piece. At the end of the year the value of these goods fell in the market to Rs. 6 per piece according to his own statement. In submitting his statement to the Income-tax Authorities for the year April, 1921, to March, 1922 (Ex. A), he has taken into account the falling price in the market for the whole stock in calculating his loss for the year though he had not sold at the stock. He has treated the remaining stock in his hand at the end of the year 7,573 pieces as being worth only Rs. 6 a piece and on that footing he has estimated his loss. In the next year instead of taking that stock as being worth Rs. 6 at which he valued it the day previous to the beginning of the year he valued it at Rs. 13-8-0 again and on that footing he has estimated his loss. He contends before us that, in fact, he made no profit over the transaction taken as a whole, that is, out of the 12,570 pieces he purchased, if the total selling value which he realised is taken into consideration, he has really lost money. That may be so. The question is whether we ought to take that into consideration and hold that though he had in his statement of account for the previous year elected to treat his loss on the whole of the 12,000 and odd pieces by the fall in the market price as a loss that occurred that year he should be allowed again to say the next year that the real loss occurred

Commissioner of Income-tax, Madras v. Chengalvaroya Chetti.

Krishnan, J.

on the balance stock when that stock was sold that year. I do not think he can be allowed to do so. The learned vakil argues that if the loss which his clients had incurred on the sale of the goods be split up and only the loss incurred on the stock which he sold in the year 1921 had been taken for the purposes of the statement for that year, he would still have made a loss for that year and the Income-tax Authorities would not have been able to levy any tax on him. That may be so, but we cannot take it into consideration at all. Having elected to treat his loss as having occurred in the year 1921-22, he cannot be allowed to treat it again as a loss in the next year also. It will not do to allow him to re-open the previous return and newly distribute the loss between the two years. It may be an advantage to do so in this case, but it would more often be a disadvantage to the assessee to do so. Having been allowed to treat his loss as one on the stock in hand the previous year, he cannot be allowed again to treat it as a loss on the sales in respect of the same stock the next year. That is the only point that really arises in this case. I entirely agree with the learned Chief Justice in the answer that he has proposed to give to the Income-tax Authorities that we consider that they were right in treating the second year's statement as erroneous in putting Rs. 13-8-0 as the initial value of the stock he had on hand and that he was only entitled to put Rs. 6 as the value of that stock. This is not a case really of the assessees having made no profit for the second year, for that entirely depends upon how the calculation is made. If he starts the second year with stock worth Rs. 6 the value he has put on it at the end of the previous year and if he sells it at Rs. 8-8-0 as he seems to have done there is manifestly a profit.

T. S. V. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Alla Viraswami ... *Appellant** (*3rd defendant*)

v.

Polavarapu Nayudamma and others ... *Respondents* (*Plaintiff and defendants* 1 *and* 2).

Viraswami v. Nayudamma.

Hindu Law—Widow—Representation of estate—Prior suit in Munsif's Court—Genuineness of husband's will established—Subsequent suit in Subordi-

*A A O No. 433 of 1923. 22nd January, 1925, and 27th February, 1925.

nate Judge's Court by reversioner—Will challenged—Plea if barred—Civil Procedure Code, S. 11—Applicability—" Competent to try such subsequent suit"—Rule of English Law—Limitation Act, S. 14—Suit originally filed in Munsif's Court—Under-valuation—Claim as regards part only of property—Return of plaint for presentation to proper Court—Time taken in Munsif's Court—If can be deducted.

The plaintiff, a daughter's son of the deceased owner of certain properties, sued for a declaration that a will alleged to have been left by him in favour of his second wife and her brother was not genuine, that he was entitled to the properties after the death of the widow and a daughter and that alienations made by them were not binding on the estate after their death. The plaint was o[illegible]iginally filed in the Court of the District Munsif, but was after some [illegible]me [illegible]turned for presentation to the proper Court and was filed in the Court [illegible] the Subordinate Judge the next day. The defence was that the suit was [illegible]rred by limitation, and that the time occupied during the pendency of the [illegible]t in [illegible]he Munsif's Court could not be deducted as there was an undervaluation [illegible]de [illegible]rposely and also as the plaintiff claimed the reliefs only with reference [illegible]a p[illegible]rtion of the properties in that Court. It was also pleaded that the [illegible]intif[illegible] was barred by *res judicata* from challenging the genuineness of the [illegible]ll, be[illegible]ause in a prior suit filed in the Munsif's Court by a legatee under the [illegible] ch[illegible]llenging an alienation made by the widow, an issue was raised about [illegible] gen[illegible]ineness of the will, and the widow who was a defendant therein admit[illegible]t a[illegible] it was so decided by the Appellate Court.

Hel[illegible] (1) the fact that in the District Munsif's Court the plaintiff had asked [illegible] relie[illegible] only against a portion of the properties comprised in the will was not [illegible] ant[illegible] considering whether he was entitled to a deduction of the time [illegible] he [illegible]e lasted in that Court, and as the Court-fee that the plaintiff would [illegible] to [illegible] was the same even if he had put the valuation at a higher figure, [illegible] [illegible]ff [illegible] entitled to the deduction under S. 14, Limitation Act; (2) the rule o[illegible] *jud*[illegible]*ta* as enacted in S. 11, Civil Procedure Code, was not strictly applicable as the plaintiff did not claim under the widow, but if the widow represented the estate in the prior litigation and fairly and honestly conducted the same, the decision therein would bind the estate. However, as in admitting the genuineness of the will in the prior litigation, she was not only not representing the estate or the interests of the reversioners, but setting up a case in direct opposition to their interests, the decision therein would not bind the plaintiff; and (3) in order to make the decision of one Court final and conclusive in another Court, it must be the decision of a Court which would have had jurisdiction over the matter in the subsequent suit and as the prior decision was that of a Munsif's Court, which by reason of its pecuniary jurisdiction could not try the subsequent suit in the Sub-Court, no plea of *res judicata* could possibly arise. Even assuming that such a requirement does not exist in English Law, it nevertheless applies to cases of decrees to which Hindu widows are parties, even though S. 11 does not in terms govern such cases. Case-law referred to.

Appeal against the order of the District Court of Guntur, dated 20th August, 1923, in A. S. No. 330 of 1922 preferred against the decree of the Court of the Subordinate Judge of Bapatla in O. S. No. 73 of 1921.

Viraswami v. Nayudamma.

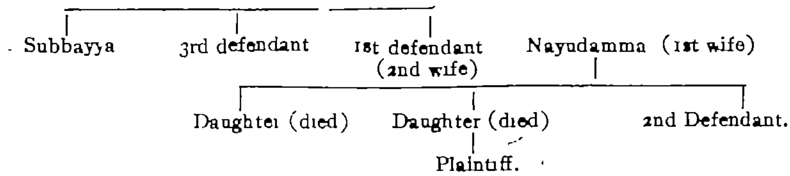
Ch. Raghava Rao for appellant.

A. Sundaram Aiyar and *V. Suryanarayana* for respondents.

The Court delivered the following

JUDGMENT :—This is an appeal by the 3rd defendant against an order of remand made by the District Judge of Guntur in A. S. No. 330 of 1922 of his file which arose out of an original suit instituted in the Subordinate Judge's Court of Bapatla.

The relationship between the parties to the suit is shown in the following table :—



The plaintiff is the daughter's son of one Nayudamma by his first wife, the 2nd defendant being his mother's sister. The 1st defendant is Nayudamma's second wife and the 3rd defendant, her brother. The suit is for a declaration that a will alleged to have been left by Nayudamma in favour of defendants 1 and 3 is not genuine, that he (plaintiff) as the daughter's son is entitled to the properties of Nayudamma after the death of the widow (1st defendant) and of the daughter (2nd defendant) and that the alienation made by defendants 1 and 2 would not be binding on the plaintiff after their death. The Subordinate Judge dismissed the suit on two preliminary grounds, viz., (1) that the suit is barred by *res judicata* by reason of the prior decision (O. S. No. 100 of 1923 of the District Munsif's Court of Ongole ; A. S. Nos. 72 and 74 of 1915, Additional Subordinate Court of Guntur) and (2) that the suit is barred by limitation. On appeal, however, to the District Judge, he held that there was no bar by *res judicata*. He also held that on the evidence on record it could not be held that the suit was barred by limitation. He therefore remanded the suit to the first Court with a direction to consider the question of limitation afresh in the light of any further evidence that the parties may be willing to offer, and if it comes to the conclusion that the suit is not barred by limitation then to proceed to dispose of the suit on the merits. Against this order of remand 3rd defendant has filed the present appeal ; and the learned vakil who appears for him has argued before

us that the District Judge's decision is wrong on both the above points.

As regards limitation, the plaintiff's case was that he came to know of the existence of the alleged will and of the decision in the prior suit regarding its genuineness only in 1918 and that, therefore, the cause of action must be deemed to have arisen only on that date. As, however, the 2nd defendant, a nearer reversioner knew of the existence of the alleged will at least on the 5th February, 1914, the date of her deposition in O. S. No. 100 of 1913, it is clear that the cause of action arose at least on that date. As observed by the Lower Court there is nothing on the record to show that either the 2nd defendant or the plaintiff knew of it earlier; we must, therefore, for the purposes of this appeal,proceed on the basis that the cause of action arose only on that date, viz., 5th February, 1914. The case is governed by the six years' rule under Art. 120 of the Limitation Act. The suit was at first filed by the plaintiff on the 23rd December, 1919, in the District Munsif's Court of Ongole. It was transferred to the Principal District Munsif's Court of Bapatla from where it was again transferred to the Additional District Munsif's Court of Ongole. On the 4th August, 1921, this latter Court returned the plaint for presentation to the proper Court as the subject-matter of the suit was found to be beyond the pecuniary jurisdiction of the District Munsif's Court and it was presented on the next day, *i. e.*, 5th August, in the Subordinate Judge's Court at Bapatla. Plaintiff's case is that he is entitled to a deduction of the time taken by him in prosecuting the suit in the District Munsif's Court (*i. e.*, from 23rd December, 1919, to 4th August, 1921) under S. 14 of the Limitation Act as he had been prosecuting it there in good faith. The learned District Judge has on a consideration of the various circumstances upheld this contention of the plaintiff, and we are not prepared to say that he has gone wrong in coming to that conclusion. As observed by him, the fact that the plaintiff had at first asked for relief only as regards the two-thirds of the properties comprised in the will is not relevant in considering whether he is entitled to the deduction of the time when the case lasted in the District Munsif's Court. It has been argued that the plaintiff must be held to have purposely undervalued the two-thirds portion itself, especially as he himself filed a statement, Ex. III, before the Munsif on 4th August, 1921, saying that the then market value of the properties was Rs. 30,000. There is nothing to

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show that on the date of the plaint he made the undervaluation purposely. The Court-fee that he would have had to pay was the same even if he had put the valuation at a higher figure. We, therefore, agree with the District Judge in holding that the plaintiff is entitled to the deduction claimed by him under S. 14 of the Limitation Act.

The facts necessary for the determination of the question as to whether the suit is barred by *res judicata* are briefly these: The widow, the 1st defendant, had made certain alienations from out of her husband's properties in her possession in favour of her brother Subbayya. In 1913 the present 3rd defendant brought a suit, O. S. No. 100 of 1913, in the District Munsif's Court of Ongole against Subbayya for setting aside the alienations. Defendants 2 and 3 to that suit were alienees from Subbayya. The plaintiff therein (present 3rd defendant) alleged that under the will executed by Nayudamma shortly before his death in 1880, the widow (1st defendant) and himself were constituted joint legatees of 2|3rds of the testator's properties, that they were in possession of the 2|3rds share in their capacity as such joint legatees and that therefore the "widow" alone had no power to make the alienations in question in favour of Subbayya. The widow was also added as the 4th defendant in that suit and one of the issues raised between the parties was whether the alleged "will" was genuine—the plaintiff therein (present 3rd defendant) and the widow (present 1st defendant) maintaining that it was genuine and the other parties saying that it was not. The issue was hotly contested and the Trial Court declared the alleged "will" to be a forgery; but the Appellate Court reversed its decision and held that the "will" was genuine. It is argued for the appellant that, because the widow was a party to the prior suit, the decision in it to the effect that the will is genuine is binding on the present plaintiff who is a reversioner. It has no doubt been held in various decisions by the Privy Council as well as by the High Courts in India that where a Hindu widow in whom her husband's estate has vested represents the estate in a litigation to which she is a party, the decision in such litigation, fairly and honestly conducted, given for or against her, will bind the reversioners. The leading case on the point is the well-known Sivaganga case [*Katama Natchiar* v. *The Rajah of Sivaganga* (1)] and it

1. (1863) 9 Moore's Ind. Ap. 539 at 604 (P C).

has been followed in several subsequent decisions [see *Pertabnarain Singh* v. *Trilokinath Singh* (2), *Risal Singh* v. *Balwant Singh* (3), etc.]. The rule of *res judicata* as enacted in S. 11 of the Code of Civil Procedure is not strictly applicable as the reversioners do not claim under the widow ; but the principle of *res judicata* has been held to apply " so as to bind the reversioners by decisions in litigation, fairly and honestly conducted, given for or against Hindu females who represented estates " in such litigation [vide *Risal Singh* v. *Balwant Singh* (3)]. This rule can be applied only if the widow did, as a matter of fact, represent the estate in the prior litigation.

In *Risal Singh* v. *Balwant Singh* (3) the widow brought the prior suit against the adopted son to set aside the adoption pleading that she had no authority from her husband to adopt and that she had not made any adoption according to any ceremony under the Hindu Law. The adopted son contested the suit and the Courts in India dismissed her suit on the ground that she was estopped from setting up this plea in view of an earlier statement by her that she had her husband's authority to adopt and did make a valid adoption. On appeal, however, the Privy Council did not base their judgment on estoppel alone but raised an issue as to her authority to adopt and held on the evidence on that issue that the adoption was valid. The subsequent suit was brought by the reversioner against the adopted son for a declaration that the adoption was invalid and for possession of the estate. The Judicial Committee state at page 603 that " There can be no doubt in their Lordships' opinion that Rani Dharam Kunwar (the widow) in her suit against Balwant Singh (the adopted son) did, notwithstanding the personal estoppel under which she laboured, represent the estate on the question of fact as to whether Balwant Singh had or had not been validly adopted, and that she represented the estate within the meaning of the ruling in *Katama Natchiar* v. *The Rajah of Sivaganga* (1) ; " and it was on this ground that they held that the reversioner was bound by the judgment in the prior suit. The question, therefore, in each case will be whether the estate was properly represented by the widow in the prior suit. If, for instance, she had litigated in assertion of an absolute right inconsistent with her representative character, we do not think that she could

1. (1863) 9 Moore's Ind. Ap. 539 at 604 (P C). 2. (1884) I L R 11 C 186 (P C)
3. (1918) I L R 40 A 593 : 36 M L J 597 (P C).

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in any sense of the word be said to have represented the estate or the interest of the reversioners in such litigation, and a decision given therein upholding such contention of hers could not obviously be held binding on them. Reference might also be made to *Bai Kanku* v. *Bai Jadav* (4) and *Rama bin Santu* v. *Daji bin Naru* (5) for the position that the widow must have represented not only her own interests but the interests of the reversioners as well in order that the decision might be binding on them. In the present case we agree with the learned District Judge in his view that "the widow was not a party to the suit in her capacity as representative of the estate which would afterwards devolve upon the reversioners, but as a beneficiary under a will according to the terms of which the reversioners were disinherited." In contending that the will alleged to have been left by the husband was genuine and that she herself was a joint legatee under it along with her brother, the present 3rd defendant, we think that she was not only not representing the estate or the interests of the reversioners in such litigation, but was setting up a case in direct opposition to their interests. It could not, therefore, be held that the decision in the prior suit that the "will" is genuine is binding on the plaintiff.

Mr. S. Varadachariar for the respondent (plaintiff) has also sought to support the Lower Court's judgment on another ground which has not been referred to by either of the Lower Courts. His argument is that the plea of *res judicata* could not be set up by the appellant in the present case inasmuch as the prior suit was in the District Munsif's Court and that Court is obviously incompetent to entertain the present suit as it is beyond its pecuniary jurisdiction. There is ample authority in support of this position: vide *Misir Raghobardial* v. *Sheo Baksh Singh* (6), *Run Bahadur Singh* v. *Lucho Koer* (7) and *Giria Chettiar* v. *Sabapathy Mudaliar* (8). These cases decided that "in order to make the decision of one Court final and conclusive in another Court it must be the decision of a Court which would have had jurisdiction over the matter in the subsequent suit on which the first decision is given in evidence as conclusive." In all these cases the prior suit was in the Munsif's Court which by reason of the limit placed on

4. (1919) I L R 43 B 869 at 883-884. 5. (1918) I L R 43 B 249 at 254.
6. (1882) I L R 9 C 439 (P.C). 7. (1884) I L R 11 C 301 at 309 (P C).
8. (1905) I L R 29 M 65.

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its pecuniary jurisdiction could not have entertained the subsequent suit and the plea of *res judicata* was rejected on that ground. The answer to this argument that was urged by Mr. Raghava Rao for the appellant is that this condition as to the competency of the 1st Court to entertain the subsequent suit though found in S. 11 of the Code of Civil Procedure is not observed in the English Law as laid down by the Judges in the Duchess of Kingstone case and that, because in the present case we have not to apply the strict rule of *res judicata* as enacted in S. 11 but only the principle of *res judicata* as mentioned in *Katama Natchiar* v. *The Rajah of Sivaganga* (1) and other cases, we need not in deciding this case be controlled by the strict provisions of S. 11 but might be guided by the principles of English Law. Assuming that the Duchess of Kingstone case does not lay down the above condition as being necessary for the application of the rule of *res judicata,* we think that so far as the Indian Law is concerned this condition must also be satisfied before a plea of *res judicata* could be upheld even in a case like the present one. In considering the reasons as to why this condition must be insisted upon, their Lordships of the Privy Council in *Misir Raghobardial* v. *Sheo Baksh Singh* (6) state thus : "In their Lordships' opinion it would not be proper that the decision of a Munsif upon (for instance) the validity of a will, or of an adoption, in a suit for a small portion of the property affected by it, should be conclusive in a suit before a District Judge or in the High Court, for property of a large amount, the title to which might depend upon the will or the adoption * * * * * * * : and although it may be desirable to put an end to litigation, the inefficiency of many of the Indian Courts makes it advisable not to be too stringent in preventing a litigant from proving the truth of his case." Reference may also be made to *Run Bahadur Singh* v. *Lucho Koer* (7) where their Lordships of the Privy Council after quoting the above passage state thus : "If this construction of the law were not adopted, the lowest Court in India might determine finally, and without appeal to the High Court, the title to the greatest estate in the Indian Empire." There seems to be no reason therefore, so far as the necessity for this condition is concerned, for making any distinction between a case to which the strict rule of *res judicata* as enacted in S. 11

1. (1863) 9 Moore's Ind. App. 539 at 604 (P C).
6. (1882) I L R 9 C 439 at 444 (P C). 7. (1884) I L R 11 C 301 at 309 (P C).

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of the Code of Civil Procedure applies and a case like the present in which the principle of *res judicata* laid down by the Privy Council in *Katama Natchiar* v. *The Rajah of Sivaganga* (1), *Risal Singh* v. *Balwant Singh* (3) and other cases is sought to be availed of. Therefore, on the alternative ground also relied on by Mr. Varadachariar, we hold that the present suit is not barred by *res judicata*.

In the result the appeal fails and is dismissed with costs.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Peta Nagayya ... *Appellant** (*3rd witness for defts.*)

Peta Nagayya, *In re.*

Civil Procedure Code, O. 16, Rr. 10 to 12—Witness—Failure to appear—Order fining him on ground of—Validity—No issue of proclamation or attachment of property prior to—Effect—"Such person" in R. 12—Meaning.

Rules 10 to 12 of O. 16 of Civil Procedure Code ought not to be construed as meaning that the issue of a proclamation or an order for attachment of property are conditions precedent to the imposition of a fine for non-attendance of a person who has been summoned to attend a Civil Court.

"Such person" in R. 12 means a person to whom a summons has been issued and who fails to attend under R. 10 (1), and is not confined to a person against whom a proclamation has been issued or whose property has been attached.

Where the appellant, who was summoned to appear as a witness on a certain date, did not appear and a warrant was issued and he was fined for disobedience of summons, *held*, that the order fining him was not without jurisdiction on the ground that there had been no issue of a proclamation or attachment of property before the fine was imposed.

Appeal against the order of the Court of the Additional Subordinate Judge of Masulipatam, dated 13th February, 1924, and made in O. S. No. 47 of 1923.

A. Venkatachalam for appellant.

The Government Pleader on behalf of the Crown.

The Court delivered the following

Spencer, J.

JUDGMENTS :—*Spencer, J.* :—The appellant was summoned on 26th January, 1924, to appear as a witness on 8th February. He did not appear and a warrant was issued and he was fined Rs. 40 for disobedience of summons. His explanation was that, as he was going to Court, after arriving at the place where the Court was held, he was met by the plaintiff and de-

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*A. A. O. No. 360 of 1924. 30th April, 1925.

1. (1863) 9 Moore's Ind. App. 539 at 604 (P C).

3. (1918) I L R 40 A 593 : 36 M L J 597 (P C).

fendants who told him that the case had been adjourned. We have no means of testing whether this statement was true. The parties were not examined to corroborate him, but the Judge did not accept the explanation. He only gave him five days' time to pay the fine.

It is argued that the Subordinate Judge acted without jurisdiction inasmuch as there was no issue of a proclamation or attachment of property before the fine was imposed. This argument is based on the decisions in *Ashutosh Mullick* v. *Secretary of State for India* (1) and *Sib Kumari Debi* v. *Secretary of State for India* (2). I regret that I must express dissent from the opinion of two learned Judges of the Calcutta High Court who decided these cases. I am unable to construe the provisions of Rr. 10 to 12 of O. 16 of the Civil Procedure Code as meaning that the issue of a proclamation or an order for attachment of property are conditions precedent to the imposition of a fine for non-attendance of a person who has been summoned to attend a Civil Court. Beachcroft, J. treats R. 12 as an alternative to R. 11 and he understands the words "such person" in R. 12 as meaning a person against whom a proclamation has been issued or whose property has been attached. In my opinion "such person" means a person to whom a summons has been issued and who fails to attend under R. 10 (1). R. 12 itself provides both for cases where an attachment has been made and for cases where an attachment has not been already made but is made in enforcement of the order of fine. It seems to me that to say that a Judge cannot fine a witness for disobedience of summons unless the preliminaries are first gone through of attaching his property or issuing a proclamation against him is to put a great and unnecessary limitation on the powers of Courts to deal with refractory witnesses. The Subordinate Judge's order was thus passed in the exercise of his jurisdiction.

There is nothing to show that the witness had ever previously disobeyed a summons of Court. He did not prove that he was told by the parties that the case had been adjourned; and, even assuming that story was true, it would not legally be a sufficient excuse for non-attendance. The fine of Rs. 40 is rather excessive, and is in contrast with the fact that all the other witnesses who were fined in the case were excused when they appeared before the Court and represented their reasons for non-appearance. I reduce the fine imposed by

1. (1920) 57 I C 302. 2. (1920) 31 C L J 365.

Peta Nagayya, *In re.*

Spencer, J.

Ramesam, J

the Lower Court from Rs. 40 to Rs. 5 (Rs. Five). The excess will be refunded. In other respects, the appeal is dismissed. No costs.

Ramesam, J. :—I entirely agree.

The case in *Ashutosh Mullick* v. *Secretary of State for India*(1) merely follows the earlier case in *Sib Kumari Debi* v. *Secretary of State for India* (2) and contains no additional reasoning. It seems to me that the argument addressed to Beachcroft, J. in *Sib Kumari Debi* v. *Secretary of State for India* (2) and which was rejected by him, namely, that O. 16, R. 12 should be construed independently of R. 11 and should be taken to refer to R. 10 is sound and might have been accepted by him. I am of opinion that O. 16, R. 12 deals with all cases of disobedience not covered by R. 11, whether there has been attachment or not. If it were not so there would be cases of flagrant disobedience with which Courts would have no power of dealing; but, apart from such considerations, O. 16, R. 12 contains clear indications that it deals also with cases where there has been no attachment. It provides for a fresh attachment of property where the witness has failed to give a satisfactory explanation if there has been no attachment of property, and, if there has been an attachment already, for sale. Both cases being expressly referred to in the section, it is difficult to construe O. 16, R. 12 as being confined to cases in which there has been an attachment.

I agree with the order passed by my learned brother.

A. S. V. *Fine reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

S. Venkatrama Aiyar ... *Petitioner** (*Petitioner-Plaintiff*)

v.

Rex ... *Respondent.*

Venkatrama Aiyar *v* Rex.

Civil Rules of Practice—Appendix A—Note (2)—Ordinary fee—Meaning—Emergent issue of process—Application for—Half-fee to be calculated in—Mode of.

The "ordinary fee" mentioned in Note (2) of Appendix A to the Civil Rules of Practice is not the Re. 1 but that *plus* the extra amount that has to be paid for any further detention beyond the three days under sub-clauses (*e*) and (*f*) of cl. (*ii*) of the said Appendix. There is nothing wrong in adding the detention fee, when detention for more than 3 days is asked for, to the fee

* C. R. P. No. 22 of 1925. 8th April, 1925.

1. (1920) 57 I C 302. 2. (1920) 31 C L J 363.

Venkatrama Aiyar v. Rex.

payable for three days and treating the whole as "ordinary fee" for the purpose or ascertaining the emergent fee.

The words "ordinary fee" in the note are really used in contradistinction to what may be called the emergent fee and not to distinguish it from the additional fee which is spoken of in clause (*ii*).

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order, dated 10th December, 1924, of the Court of the District Munsif of Mannargudi in E. P. No. 7 (E. P. R. No. 871 of 1924) in O. S. No. 166 of 1922 on the file of the Court of the Subordinate Judge of West Tanjore.

G. Lakshmanna for petitioner.

The Government Pleader on behalf of the Crown.

The Court delivered the following

JUDGMENT :—This is an application to revise an order passed by the District Munsif of Mannargudi on an emergent application for execution by the arrest of the judgment-debtor. The application asked for the issue of an emergent process with detention for five days and on the application a fee of Rs. 2-6-0 was paid for process fee and 12 annas in cash for subsistence allowance. We are not concerned in this case with the subsistence allowance; but the application was returned on the ground that the process-fee paid was deficient by seven annas. The way in which the fee for the process was calculated is this: According to the Schedule of Process Fees in Appendix A to the Civil Rules of Practice, for a warrant of arrest in respect of one person to be arrested the rate of fee is Re. 1 and this includes detention for three days. When the decree-holder wants a further detention for five days, he has to pay at the rate of six annas per day under sub-cl. (*a*) of cl. (*ii*) of the Schedule of Process Fees already referred to. He also paid eight annas as extra fee for the urgent application, in all Rs. 2-6-0. The office calculated the fee thus: For five days Rs. 1-14-0; half of that for the emergent application Re. 0-15-0; total Rs. 2-13-0; and hence the Lower Court noted that there was a deficiency of seven annas in the fee paid.

The contention before me is that, in an application for the emergent issue of process in the Munsif's Court, the half-fee that has to be calculated under Note 2 of Appendix A is only half of one rupee which, it is contended, is "the ordinary fee". Note 2 to Appendix A reads thus: "For processes applied for and ordered to be executed as emergent the fee

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will be the ordinary fee and half as much again." Tl Government Pleader, on the other hand, contends that 't ordinary fee' mentioned therein is not the Re. 1 but th *plus* the extra amount that has to be paid for any further tention beyond the three days under sub-cls. (*e*) and (*f*) cl. (*ii*) ; it is between these two contentions I have to decide

I am inclined to think that the Government Pleader correct. I think the words "ordinary fee" in the note a really used in contradistinction to what may be called the eme gent fee. The ordinary fee payable in respect of a warra for arrest if the detention was for three days is Re. 1, but it was for more than three days, an extra amount has to added and the whole amount is the ordinary fee. F example, if a man applies for the issue of an ordinary proce of arrest and wants that the warrant should be kept alive f ten days and wants that the warrant should be executed by Amin, he would have to pay Rs. 3-10-0 in all. That is t ordinary fee upon an application for arrest with ten days' d tention. If that very same thing has to be executed eme gently he will have to pay half as much again under Note It is clear that there is nothing wrong in adding the detenti fee when detention for more than three days is asked for, the fee payable for three days and treating the whole "ordinary fee" for the purpose of ascertaining the emerge fee, because the applicant gets the benefit not only of the iss of the process urgently in the office and the sending of it the Central or Deputy Nazir for entry in his B Register b also the benefit of its emergent execution by the Amin who h to give preference to emergent applications over the ordina applications in his hand, and there is no reason why the Amir fee should not also be increased by 50 per cent. in the case emergent applications. The notification published on 7 October, 1924, in Part II of the *Fort. St. George Gazette* page 1801 shows what the benefits are that a person, who ge an emergent process issued, gets. It says : "The process shall be prepared urgently under the supervision of the Chi Ministerial Officer of the Court and the process memos wi the processes shall then be transferred urgently to the Centr or Deputy Nazir for entry in his B Register and emerge execution of the processes." It is suggested that the wor "ordinary fee" used in Note 2 to Appendix A are used distinguish it from the additional fee which is spoken of cl. (*ii*). I do not agree with this view. I think the wor

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"ordinary fee" in Note 2 are used to distinguish it from the emergent fee and not to exclude the additional fee talked of in the beginning. The additional fee is as much a portion of the ordinary fee on an ordinary application for arrest of a person as the original fee itself is.

In these circumstances I think the order of the District Munsif calling for a further payment of seven annas on the application before him was correct. The petition, therefore, fails and is dismissed. No costs.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Kancherla Kanakayya ... *Appellant** (*1st defendant*)

v.

Sri Rajah Venkataramayya Apparao Bahadur and others ... *Respondents* (*1st and 2nd plaintiffs and defendants 2 to 10*).

Kanakayya v. Sri Rajah Venkataramayya Apparao Bahadur.

Civil Procedure Code, O. 32, R. 7—Decree in favour of a minor—Transfer by guardian ad litem *of—Sanction of Court—Necessity—Transfer without such sanction—Effect—Right of third parties to plead that transfer is void* ab initio *on the ground of want of sanction of Court.*

The sanction of the Court under O. 32, R. 7 of the Civil Procedure Code is necessary to the transfer of a decree in favour of a minor by his guardian *ad litem*. But a transfer made without such sanction not absolutely void against the minor. The minor can avoid it on attaining majority if he thinks fit; it can be avoided even earlier if some guardian on his behalf thinks fit to establish its invalidity. It can also be ratified by the minor. It is not open to a third party to intervene in a transaction of that kind and to plead that it is void *ab initio* when neither of the parties to the transaction accept that position.

Second Appeal against the decree of the Court of the Subordinate Judge of Bezwada in A. S. No. 7 of 1921 preferred against the decree of the Court of the District Munsif of Bezwada in O. S. No. 125 of 1919.

G. Lakshmanna for appellant.

T. Ramachandra Rao for respondent.

The Court delivered the following

JUDGMENT :—The question at issue in this appeal is, whether the transfer of the decree in favour of the 2nd defendant by his guardian *ad litem* to the 1st defendant is valid

*S A No. 727 of 1922. 30th March, 1925.

Kanakayya v. Sri Rajah Venkataramayya Apparao Bahadur.

and whether the plaintiff is entitled to contend that it shall be deemed invalid. The Lower Courts have found that the transfer was not a fraudulent or colourable transaction and consequently the plaintiff cannot avoid it as being a transaction in fraud of creditors, but it is contended that inasmuch as the guardian *ad litem* did not obtain the sanction of the Court to the transfer it is void. This question has been considered in this Court and it has been held in *Kancherla Kanakayya* v. *Mulpuru Kotayya* (1) that the sanction of the Court to such a transfer even after a decree is necessary, and in this it follows the prior decision in *Shaik Davud Rowther* v. *Paramaswami Pillai* (2) which itself follows *Virupakshappa* v. *Shidappa and Basappa* (3).

O. 32, R. 7 (2), Civil Procedure Code, does not say that a transaction in which the sanction of the Court has not been obtained shall be void, but that it shall be voidable as against all parties other than the minor. That means that the minor can avoid the transaction on attaining majority if he thinks fit, or even earlier if some guardian on his behalf thinks fit to establish its invalidity. This has been held in *Ishan Chandra Kundu* v. *Nilratan Adhikari* (4), *Phulwanti Kunwar* v. *Janeshar Das* (5) and *Jita Singh* v. *Man Singh* (6).

It is now urged for the respondents that although the transaction is only voidable as against all parties other than the minor it is absolutely void as against the minor, but this cannot be so, otherwise the minor could not ratify it, if it were void *ab initio*.

Then there seems to be no ground for allowing a third party to intervene in a transaction of this sort and to plead that it is void *ab initio* when neither of the parties to the transaction accept that contention. The transaction must be either ratified or impeached by the minor and it is not open in this case for the plaintiffs to say that it is not valid. The plaintiffs cannot consequently set aside this transaction and their suit therefore fails and is dismissed with costs throughout.

A. S. V. *Suit dismissed.*

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1. (1921) 41 M L J 75.
2. (1916) 31 M L J 207.
3. (1901) I L R 26 B 109.
4. (1923) I L R 2 Patna 538.
5. (1924) 22 All. L J 521.
6. (1921) 62 I C 794.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

Syed Muhammad Sahib ... *Petitioner** (*Petitioner—1st defendant*)

v.

A. P. R. L. Alagappa Chettiar ... *Respondent* (*Counter-petitioner—Plaintiff*).

Syed Muhammad Sahib *v.* Alagappa Chettiar.

Civil Procedure Code, O. 9, R. 13—Application under—Matters to be considered in—Merits of defence—Defendant's knowledge of suit after decree—Consideration of, irrelevant—Sufficient cause for non-appearance—Order rejecting application without considering—Irregularity—Interference with order in revision—Limitation—Bar of application by—Defendant's knowledge of suit if and when a—Summons—Service by affixture—When proper.

Where, on going to the village of the defendant, the Amin learns that the defendant had gone to another named village and other places and the time of his return was not known and that there was no adult male member in the defendant's family, and thereupon affixes the summons to the outer door of the defendant's house, the service is not a substituted service but is a good service.

In an application under O. 9, R. 13, what the Court has to find is not whether the defendant has any good defence on the merits but whether there is proper service and if there is proper service whether there was sufficient cause for his non-appearance. The defendant's knowledge of the suit after the passing of the decree is irrelevant except for the purpose of deciding whether the application under O. 9, R. 13 is barred by limitation. Even for the purposes of limitation a vague knowledge that a decree had been passed by some Court is not enough. It must be found that the defendant had knowledge that a particular decree had been passed against him in a particular Court in favour of a particular person and for a particular sum.

The Court below acts with material irregularity in rejecting an application under O. 9, R. 13 without addressing itself to the proper question, viz., whether sufficient cause was shown by the defendant for non-appearance and the High Court is justified in interfering with that order in revision.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the judgment and decree of the District Court, Coimbatore, in C. M. A. No. 70 of 1923, preferred against the order of the Court of the District Munsif of Tiruppur in I. A. No. 1181 of 1923 in O. S. No. 1006 of 1922.

Watrap S. Subramania Aiyar for petitioner.

S. Muthiah Mudaliar for respondent.

The Court delivered the following

JUDGMENT :—The facts of this revision petition may be stated as follows : The respondent before me was the plaintiff

*C. R. P. No. 143 of 1924. 8th April, 1925.

Syed Muhammad Sahib v. Alagappa Chettiar.

in O. S. No. 1006 of 1922 on the file of the District Munsif of Tiruppur. He filed a suit to recover Rs. 797-9-6 due on a pro-note executed on 27th December, 1919, by the two defendants. The 2nd defendant never appeared in the suit and we are not now concerned with him. The 1st defendant is the petitioner before me. The first summons to him was issued in April, 1922. It was not personally served and a fresh service was ordered. Summons was taken out a second time in July, 1922. The Amin went to the village of the defendants on 7th July. He learnt that the defendants had gone to Satyamangalam and other places and the time of their return was not known and that there was no adult male member in their families. The summonses were then affixed to the outer doors of their houses. These facts were sworn to by the Amin before the Deputy Nazir and apparently also confirmed by the report of the village officer. This return of the Amin was on the 10th July. The District Munsif ordered the suit to proceed *ex parte* and the case was taken up on the 19th July and decreed in favour of the plaintiff. The 1st defendant filed the present petition on the 7th of August, 1923 with an affidavit in which he states that he was not aware of the suit, that the notice in E. P. No. 2104 of 1923 (a petition filed for the execution of the decree) was served on him on 31st July, 1923. He mentioned other facts going to show that there was collusion between the plaintiff and the 2nd defendant and referred to a mortgage obtained by the plaintiff's brother from the 2nd defendant. He afterwards applied for and obtained a copy of this mortgage and filed it before the District Munsif on the 19th of October, 1923. The District Munsif said: "No doubt there was no personal service but 1st defendant has apparently been aware of the decree and second defendant's alleged partial adjustment of it * * * * 1st defendant's defence on the merits seems to be very weak. * * * * *. I am not inclined to set aside the decree." In an application under O. 9, R. 13, what the Court has to find is not whether the defendant has any good defence on the merits but whether there is proper service and if there is proper service whether there was sufficient cause for his non-appearance. I presume that in this case there was service which was good service according to law though I should think Courts ought not to proceed to the trial of a case until at least three services have been taken upon the defendants which is the practice in the High Court and I would like this to be

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followed in the Courts below before the case is allowed to proceed *ex parte*, but as I said I will assume that there was some good service according to law. But even then a defendant may give a good reason for non-appearance. He may tell the Court that as a matter of fact he was unaware of the suit which means that he never saw any paper pasted on the outer door of his house. If the Court believes him it follows that he could not be aware of the suit and in such a case though there was good service there is sufficient cause for the non-appearance of the party, and in such a case the Court ought to set aside the *ex parte* decree.

In *Arunachala Aiyar* v. *Subbaramiah* (1), Schwabe, C. J., and Wallace, J., held that this ought to be the attitude of the Court in dealing with an application of this kind though no doubt there the facts were somewhat different. The same view was taken by the same Bench in *Lakshminarayana* v. *Standard Oil Co. of New York* (2) though again the facts are somewhat different. Whether the 1st defendant was aware of the decree after the passing of the decree and partial adjustment by the 2nd defendant is irrelevant except for the purpose of deciding whether the petition is barred by limitation. There is no finding by the District Munsif that the petitioner became aware of the decree on or before a particular date. It is therefore clear to me that the District Munsif did not refer to the mortgage document and the 1st defendant being aware of the decree for the purpose of limitation. The application for the copy of the mortgage itself was made after the filing of the petition. If it is not useful for the purpose of limitation it is irrelevant for any other purpose. I therefore think the District Munsif has not addressed himself to the question that has to be decided in an application of this sort. On appeal the District Judge says : "Appellant was twice affixed, his co-executant's (second defendant's) property was attached before judgment.* * * * * I cannot believe his statement that he had no knowledge of the suit until more than a year after the decree." The statement that the appellant was twice affixed only amounts to saying that there was service which was good according to law, a matter with which I agree. The next statement "his co-defendant's property was attached before judgment" seems to be irrelevant. Assuming that a man heard of the attachment of a co-defendant's property, it does

1. (1922) I L R 46 M 60 : 43 M L J 632. 2. (1923) 44 M L J 488.

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not follow that he has evaded service or that he abstained from appearing without proper cause. It may be he was waiting for being served and never got the summons. The next statement of the District Judge that he cannot believe the petitioner's statement that he had no knowledge of the suit until more than a year after a decree again leads to no conclusion. Unless the District Judge finds positively that the petitioner was aware of the decree at a time which was more than a month before the petition, it is not barred by limitation. And apart from the limitation the knowledge of the suit after a decree is irrelevant for any other purpose. I therefore think the District Judge also has not addressed himself to the proper question. The case *Sankaralinga Mudali* v. *Ratnasabapathi Mudali* (3) only shows that an Amin is justified in affixing the summons to the door if there is no prospect of his being able to serve the defendant within a reasonable time. I assume this point in favour of the respondent in this case. In *Abraham Pillai* v. *Donald Smith* (4) it was laid down that summons if possible must be served in person and that substituted service should be ordered only when reasonable grounds exist for believing that defendant is keeping out of the way to avoid service or for other reasons, he cannot be served in the ordinary way. Because these conditions are not fulfilled the High Court interfered in revision. It is true the present case is not a case of substituted service and I have held that the service on the door by affixture was good service but still as the Courts below have not considered the question whether sufficient cause was shown by the defendant for non-appearance, I hold it is an irregularity justifying my interference in revision. In *Abraham Pillai* v. *Donald Smith* (4) the High Court itself set aside the *ex parte* decree. A similar view was taken in *Nagari Rasappa Setti* v. *Namburi Venkataratnam* (5) though I keep before my mind the fact that the revision petition in that case was a petition under S. 25 of the Small Cause Courts Act. Waller, J., seems to have taken a similar view in Civil Revision Petition No. 745 of 1924. In *Bapurao Sitaram* v. *Sadbu Bhiva* (6) it was pointed out that even for the purposes of limitation a vague knowledge that a decree had been passed by some Court is not enough. It must be found that the defendant had knowledge that a particular

3. (1897) I L R 21 M 324 : 8 M L J 58. 4. (1906) I L R 29 M 324.
5. (1913) M W N 1028. 6. (1922) I L R 47 B 485.

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decree had been passed against him in a particular Court in favour of a particular person and for a particular sum. I agree with this view of Macleod, C. J., and Crump, J. A vague suspicion that the defendant must have heard of some decree is not enough to dismiss his petition on the ground that it is barred by limitation. It is true that the view in *Abraham Pillai* v. *Donald Smith* (4) was not fully concurred in *Sitaram* v. *Kalandi Patra* (7), *Pitchayya* v. *Mahomed Abdul Kareem* (8) and *Kasivisvanathan Chetty* v. *A. S. P. L. S. Somasundaram Chetty* (9). In *Sitaram* v. *Kalandi Patra* (7) the defendant left Bengal for the Madras Presidency. It was held there was good service but the question whether there was sufficient cause for non-appearance otherwise was not discussed. The only point discussed is whether the Amin's affixture of the summons was proper. This case was followed in *Pitchayya* v *Mahomed Abdul Kareem* (8). In *Viswanathan Chetty* v. *Arunachallam Chetty* (10) the defendant had gone to a foreign territory. Substituted service was held to be proper and no other question was discussed. The same remarks apply to *Basavayya* v. *Kistna Brahmam* (11). In *Bhaichand Ful Chand* v. *Dawood Ayub* (12) the defendant had notice. The only question is whether he could not attend on account of illness and the High Court refused to interfere in revision. Following *Abraham Pillai* v. *Donal Smith* (4) and the principle laid down in *Arunachella Aiyar* v. *Subbaramiah* (1) and *Lakshminarayana* v. *Standard Oil Co. of New York* (2) I hold I am entitled to interfere in revision. I find that the defendant was not as a matter of fact aware of the suit and showed sufficient cause for non-appearance. I set aside the order of the Courts below and direct the District Munsif to proceed with the suit according to law only so far as 1st defendant is concerned. But as I have no desire to be unduly lenient to the petitioner, the costs in all the Courts will abide the result. The security already furnished by the petitioner will continue till the disposal of the suit.

A. S. V. *Order set aside.*

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1. (1922) I L R 46 M 60 : 43 M L J 632. 2. (1923) 44 M L J 488.
4. (1906) I L R 29 M 324. 7. (1911) 13 I C 127.
8. (1914) 26 M L J 368. 9. (1921) 42 M L J 422.
10. (1911) 21 M L J 978. 11. (1914) 1 L. W. 351. 12. (1923) 76 I C 60.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

S. Kambhotlu ... *Appellant** (*Plaintiff*)

v.

Ashreef Hussain ... *Respondent* (*Defendant*)

Kambhotlu v. Ashreef Hussain.

Police Officer—Omission to receive complaint of offence—Suit for damages—Maintainability—Cause of action.

A suit for damages cannot be maintained against a police officer merely because he refused to receive a complaint of theft preferred to him by the plaintiff. The non-discharge of a public duty by a public servant does not give a right of action in damages to any member of the public.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Bezwada in A. S. Nos. 89 and 91 of 1923 (A. S. Nos. 53 and 57 of 1923 on the file of the Court of the Subordinate Judge of Bezwada) preferred against the decree of the Court of the District Munsif of Bezwada in O. S. No. 645 of 1921.

The following authorities were cited by Mr. Lakshmanna in the course of his argument:—Halsbury's *Laws of England*, Vol. XXIII, p. 217; Vol. XXVII, Arts. 939, 942; Clerk and Lindsell on *Torts* (5th ed.), pp. 137, 138; Sedgwick on *Damages* (9th ed.), Vol. II, pp. 1056-1060; *Ashby* v. *White*, 2 Lord Raymond 938.

G. Lakshmanna for *V. Subramaniam* for appellant.

The judgment of the Court was delivered by

Devadoss, J.

Devadoss, J.:—The plaintiff sues the 1st defendant for damages for not making proper arrangements for receiving his complaint of theft. The point raised in the second appeal is that the Lower Court erred in not holding that the plaintiff had a cause of action against the 1st defendant. The plaintiff, a High Court Vakil, went to complain of a case of theft and the allegation is that his complaint was not received by the policeman in his station as they were prohibited from receiving any complaint by the 1st defendant who is the respondent in the second appeal. Granting the facts to be correct, the question is whether the plaintiff has a cause of action against the 1st defendant. Mr. Lakshmanna contends that the police officer is bound to take down the report of a case made by a member of the public and, he not having

*S. A. No. 81 of 1925. 15th April, 1925.

received the complaint preferred by the plaintiff, is liable in damages to the plaintiff. No doubt a police officer is bound to receive a complaint when it is preferred to him or where the commission of an offence is reported to him orally he is bound to take down the complaint. But the question is whether his non-compliance with the duty imposed upon him gives a cause of action to the plaintiff. It cannot be said that the plaintiff has suffered any damage by the action of the defendant. If the defendant has not performed his duty as a public servant, he is liable to be dealt with by his superior officers for neglect of duty. But that would not give cause of action to the plaintiff to sue the defendant for damages because there is no duty on the part of the defendant to do anything in respect of the plaintiff. The non-discharge of a public duty by a public servant does not give a right of action in damages to any member of the public. Mr. Lakshmanna's contention is that inasmuch as his client had lost property by theft and as his case was not inquired into he has suffered damage. It is difficult to see what damage he could have suffered by a case of theft not being inquired into. The cases relied upon by him have no application to the present case. If a Sheriff's officer or an Amin of a Civil Court does not arrest a judgment-debtor and allows him to escape, he may be liable in damages, for he fails to do something which he is required by law to do for the benefit of the plaintiff who is interested in arresting the judgment-debtor. No such duty is cast upon a police officer with regard to taking down complaints of offences. The general statement that for a breach of public duty an action would lie in damages is not supported by any authority which we can follow. We hold that the plaintiff had no cause of action against the 1st defendant even if the plaintiff had gone to him to complain of a case of theft and the defendant refused to receive the complaint. The second appeal is dismissed.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

Chinna Vavanan *alias* Kanakathu Meera Levai Rowther, by the Official Receiver, Madura ... *Appellant** (*Petitioner*)

v.

Chettiappa Chetti (by the authorised Agent Lakshmana Chetti) and others *Respondents* (*Respondents* 1, 2 *and* 4 *to* 8).

Chinna Vavanan *v.* Chettiappa Chetti.

Decree—Sale in execution of—Reversal of decree subsequent to—Setting aside of sale on ground of—Purchase by party to suit not benefiting directly under decree reversed—Purchase bona fide *by stranger to suit—Distinction.*

The appellant was the 1st defendant in a suit brought to enforce a mortgage executed by him in favour of the plaintiff. The 2nd defendant was a subsequent mortgagee of the property and was impleaded as such. The appellant was *ex parte*. A decree was passed in favour of the plaintiff and the hypotheca was sold in execution of that decree and was purchased by the 2nd defendant. The *ex parte* decree was subsequently reversed on appeal.

On an application by the appellant to have the sale set aside, *held*, reversing the Courts below, that the sale was liable to be set aside.

The protection which is given to a *bona fide* purchaser should not be extended to a defendant or a party to the suit even though he gets no benefit directly under the decree ; in other words, it is only a *bona fide* purchaser, who is not a party to the suit or proceeding that is entitled to keep the property purchased by him. In all other cases the purchase is liable to be defeated on the reversal of the decree in execution of which the sale is effected.

Appeal against the decree of the Court of the Subordinate Judge of Dindigul in Appeal No. 34 of 1921 preferred against the order of the Court of the District Munsif of Periyakulam dated 20th December, 1920, in E. A. No. 1170 of 1919 in O. S. No. 1412 of 1917.

B. Sitarama Rao and *S. R. Muthuswami Aiyar* for appellant.

T. M. Krishnaswami Aiyar and *N. Ramachandra Aiyar* for respondents.

The Court delivered the following

Devadoss, J.

JUDGMENTS :—*Devadoss, J.* :—The appellant was the 1st defendant in O. S. No. 1412 of 1917. The suit was by a mortgagee against the mortgagor (1st defendant) and the purchaser was impleaded as 2nd defendant as he had a mortgage subsequent to that of the plaintiff. The appellant was

*A. A. O. No. 104 of 1922. 15th January, 1923.

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Devadoss, J.

ex parte in the District Munsif's Court. A decree was passed in favour of the plaintiff and the hypotheca was sold and was purchased by the 2nd defendant. The *ex parte* decree was reversed on appeal and the 1st defendant applied to have the sale set aside. The 1st defendant having been adjudicated an insolvent, the Official Receiver continued the proceedings before the District Munsif. The District Munsif held that the 2nd defendant was not a decree-holder and therefore the sale was not liable to be set aside. On appeal by the Official Receiver the Subordinate Judge held that the order of the District Munsif was right and dismissed the appeal. The Official Receiver has preferred this appeal.

The contention of the appellant is that the purchase by the 2nd defendant is liable to be set aside as the decree in execution of which he purchased the property was set aside on appeal. It is well settled that, if a decree-holder purchases the property of the judgment-debtor in execution of his decree which is afterwards set aside, his purchase is liable to be set aside at the instance of the judgment-debtor. The contention for the respondent is that the 2nd defendant is not a decree-holder and therefore his purchase is good against the judgment-debtor. In *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan* (1) it was held that a sale to a *bona fide* purchaser in execution of a decree was not liable to be set aside if the decree was afterwards reversed on appeal. Their Lordships observed at page 172 : "It appears to their Lordships that there is a great distinction between the decree-holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the *bona fide* purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order." The question is whether the protection given to *bona fide* purchasers extends to persons who are parties to the suit in which the decree is passed, but who are not given any relief under the decree. In order that a purchaser may have the benefit of the sale under a decree which is afterwards set aside, he must be a *bona fide* purchaser. If he is not a *bona fide* purchaser then the purchase by him is liable to be set aside. A stranger to the decree is not bound to enquire into the merits of the plaintiff's claim or into the validity of the decree ; but a party to the suit is in a different position, and it is his duty

1. (1887) I L R 10 A 166 (P. C).

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to enquire into the nature of the plaintiff's claim and the validity of the decree passed in plaintiff's favour. Supposing the plaintiff asked for relief in the alternative against two defendants, if the 2nd defendant satisfies the Trial Court that the 1st defendant alone is liable and on the strength of that a decree is passed and his property is brought to sale, and if on appeal the decree is set aside and the 2nd defendant is held liable, can it be said that the 2nd defendant is entitled to keep the property of the 1st defendant purchased by him in Court auction notwithstanding the reversal of the decree supposing a defendant contests the plaintiff's suit on the merits and a decree is passed not against him but against another defendant and if the property of the defendant against whom the decree is passed is brought to sale and if the defendant who put forward the contention that the plaintiff's claim is a fraudulent one purchases the property and if the decree is afterwards set aside, can the defendant who purchased the other defendant's property be entitled to say that his purchase is good notwithstanding the fact that he was aware of the fraudulent nature of the plaintiff's claim. It may be said in such a case that he is not a *bona fide* purchaser. The decision in *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan*(1) applies only to *bona fide* purchasers. In that case, the purchasers, whose purchase was upheld by the Privy Council, were strangers to the decree. It does not appear from the report whether they were, or were not, strangers to the suit. It cannot be assumed that the decision has no application to purchasers who are parties to the suit, but in whose favour no decree has been passed, from the mere fact that Sir Barnes Peacock uses the expression "*bona fide* purchasers who are no parties to the decree". A party to a suit cannot be said not to be a party to the decree if he gets no relief under it. If a party to a suit is on record, the decree is bound to make mention of him; and the principles of *res judicata* or of estoppel may apply to him whether he gets or not any relief under the decree. The decision, therefore, in my opinion covers the case of a party in whose favour no relief is given under the decree.

The contention of Mr. Krishnaswami Aiyar is that the principle of restitution is applicable only to decree-holders who purchase the property of the judgment-debtor in execution of, or who get some benefit under, their decree, and persons in whose favour a decree is not passed are not bound to make

1. (1887) I L R 10 A 166 (P C).

restitution of what they have got by purchase in a Court auction. The cases relied upon by him do not support the contention that the defendant, in whose favour there is no decree, is entitled to keep the property which he purchased in execution of the decree against another defendant even if the decree be upset either in appeal or in any subsequent proceeding. In *Syed Nathadu Sahib* v. *Nallu Mudaly* (2) it was held that where a property is purchased at a sale in execution of a decree, the purchase is subject to the final result of the litigation between him and the judgment-debtor. In *Moithecnsa Rowthan* v. *Apsa Bivi* (3) the purchaser was a stranger to the decree. In *Raghavachari* v. *Pakkiri Mahomed Rowther* (4) the purchaser was not a party to the suit. As observed in *Duraiswami Aiyar* v. *Annaswami Aiyar* (5), " the principle of doctrine of restitution is that on the reversal of a judgment the law raises an obligation in the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost. " It is contended for the respondent that this must be limited to the decree-holder who gets benefit by reason of his decree. But I am unable to accept this view. In this case, if the hypotheca had fetched a very large price and if a balance remained after satisfying the plaintiff, the balance would go to satisfy the 2nd defendant who is a puisne mortgagee. Even though a defendant may not have a decree in his favour, in many cases, he may get ultimately a benefit under the decree. In such cases it cannot be said that he is a stranger to the decree. The decision in *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan* (1) does not seem to have been brought to the notice of the learned Judges who decided *Duraiswami Aiyar* v. *Annaswami Aiyar* (5). The American decision in *Quan Wo Chung Co.* v. *Laumeister* (6) in laying down, " all that the one has gained and all that the other has lost is due to the agency of the Court and therefore no injustice is done in restoring the party wrongfully dispossessed without stopping to investigate the rights of the party who has thereby gained the possession," has stated the principle too broadly. I think the correct principle is that a *bona fide* purchaser who is not a party to the suit or proceeding in which the auction sale is held, is entitled to hold the pro-

1. (1887) I L R 10 A 166 (P C). 2. (1903) I L R 27 M 98.
3. (1911) I L R 36 M 194 : 21 M L J 969. 4. (1916) 30 M L J 497.
5. (1899) I L R 23 M 306 at 310 : 10 M L J 307.
6. 17 Am. State Reports 262, 263.

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perty even though the decree or order in execution of which the auction sale is held is subsequently reversed or set aside.

In *Yellappa* v. *Ramchandra* (7), Farran, C. J. observes : "The Privy Council in a case very analogous to the present has decided that where a person, a stranger to the proceedings, purchases property *bona fide* at an auction sale held in execution of a decree, his sale cannot be set aside on the ground that the existence of a cross-decree rendered the sale in execution improper." If the contention of the respondent is good, then a defendant, in whose favour there is no decree, would be entitled to keep the property which he purchased in Court auction, even though he knew that there was a cross-decree in favour of the defendant whose property was sold in execution. I think the principle of the decision in *Rewa Mahton* v. *Ram Kishen* (8) and in *Yellappa* v. *Ramchandra* (7) is against the contention of the respondent.

This point was specifically raised and decided by a Bench of the Calcutta High Court in a case reported in *Narendra Chandra* v. *Jogendra Narain* (9). In that case Mookerjee, J., after an exhaustive examination of English and American cases observed : "An examination of these cases show that protection is afforded to the purchaser only when he is a stranger to the suit." This principle is not only consonant with equity but it also saves the Court the trouble of enquiring whether the defendant, in whose favour there is no decree at the time of the sale, would be entitled to some benefit after the sale. I think the protection which is given to a *bona fide* purchaser should not be extended to a defendant or a party to the suit even though he gets no benefit directly under the decree; in other words, it is only a *bona fide* purchaser who is not a party to the suit or proceeding that is entitled to keep the property purchased by him. In all other cases the purchase is liable to be defeated on the reversal of the decree in execution of which the sale is effected.

In the result the appeal is allowed and the sale to the 2nd defendant is set aside with costs throughout.

Wallace, J.

Wallace, J. :—I have had the advantage of perusing the judgment of my learned brother and I am not prepared to differ from his opinion in the case. I was at first inclined to hold that in such a case the principle of restitution, that is the resto-

7. (1896) I L R 21 B 463.

8. L R (1886) 13 I A 106. 9. (1913) 20 C L J 469.

ration to his *status quo ante* of a person wrongfully dispossessed by the agency of the Court, should be enforced only against the party at whose instance the decree has been enforced, but on further consideration I think, as at present advised, that this salutary principle of restitution should be enforced as the rule, and that exceptions to that rule should be allowed only so far as authority by which we are bound has allowed them. The Privy Council in *Zain-ul-Abdin Khan* v *Muhammad Asghar Ali Khan* (1) has laid down that a *bona fide* purchaser not a party to the decree forms an exception to the rule, and we are not referred to any case which has definitely extended the exception to auction purchasers who are parties to the suit or decree, but who had not themselves enforced the decree and brought about the auction sale.

I therefore agree in the order proposed by my learned brother.

A. S. V. —————— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Gokuldoss Goverdhan Doss (dead) and another ... *Appellants**

v.

Dwarakadoss Goverdhan Doss (dead) and others ... *Respondents.*

Gokuldoss Goverdhan Doss. v. Dwarakadoss Goverdhan Doss.

The Presidency Towns Insolvency Act (*III of* 1909), *S.* 11 (*d*)—*Carrying on business—Meaning of—Family trading firm—Suit for partition—Appointment of Receiver—Effect of—Insolvency petition filed more than one year after—Firm if can be adjudged insolvent—R.* 47 *of the Insolvency Rules—If* ultra vires.

Pending a suit for partition among the members of a Hindu joint family, which also owned a trading firm, a Receiver was appointed to carry on the business. More than a year after the appointment of the Receiver, one of the creditors of the firm applied to adjudicate the firm insolvent. It was pleaded that after the appointment of the Receiver, the firm could not be said to have "carried on business" within the meaning of S. 11 (*d*) of the Presidency Towns Insolvency Act and that no adjudication order could be validly made. *Held*, a business must be deemed to be carried on so long as there are debts undischarged and assets to be got in and the appointment of the Receiver would not affect the question. Whether a firm has carried on business or not within a year before the date of the filing of the insolvency petition is a question of fact in each case.

R. 47 of the Insolvency Rules which says that an order of adjudication shall be made against partners individually does not mean that an order of adjudica-

*O S Appeal Nos. 86 and 87 of 1924. 6th March, 1925.

1. (1887) I L R 10 A 166 (P C).

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tion shall not be made against the firm. If it has that meaning, it is at variance with S. 99 and may be *ultra vires*.

On appeal from the judgment and order of the Hon'ble Mr. Justice Waller, dated the 28th Nov., 1924, and passed in the exercise of the Original Insolvency Jurisdiction of the High Court in I. P. No. 351 of 1924.

In the matter of Muralidoss Ramdoss & Co. ... *Debtors.*

Parry & Co. ... *Petitioners.*

P. Jagannatha Rao Naidu for appellant in O. S. A. No. 86 of 1924.

Nugent Grant instructed by *Messrs. King* and *Partridge* for respondents in O. S. A. No. 86 of 1924.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for appellants in O. S. A. No. 87 of 1924.

Nugent Grant instructed by *Messrs. King* and *Partridge* and *P. Jagannatha Rao Naidu* for respondents in O. S. A. No. 87 of 1924.

The Court delivered the following

Spencer, J.

JUDGMENTS :—*Spencer, J.* :—These are appeals against the order of Mr. Justice Waller adjudicating the firm of Muralidoss Ramdoss & Co., insolvent, and finding that the two brothers Gokuldoss and Dwarakadoss were partners in it. The counter-petitioners 3 & 4, namely Govindoss Krishnadoss *alias* Babu, who is the son of Krishnadoss Muralidoss, and Ramdoss, son of Dwarakadoss Goverdhan Doss, being minors, were excluded. O. S. A. No. 86 is by the first counter-petitioner Gokuldoss and O. S. A. No. 87 is by the second counter-petitioner Dwarakadoss Goverdhan Doss. As he died after filing the appeal his son Ramdoss is allowed to continue it. The facts which appear from the affidavits on either side are, that the first counter-petitioner Gokuldoss's deceased father Goverdhan Doss and his deceased uncle Muralidoss Ramdoss were carrying on business in buying and selling houses and lands in Madras under the trade name of Ramdoss Muralidoss & Co., and after their deaths the first counter-petitioner and Krishnadoss Muralidoss, now deceased, carried it on. Messrs. Parry & Co. obtained a decree in O. S. No. 1007 of 1922 on the Original Side of this Court for Rs. 49,117 against this firm. Other creditors of the firm obtained a decree for Rs. 75,206 and attached the properties belonging to the firm on the 9th September, 1924. The property remained attached for a period of 21 days and notice was given to Gokuldoss of the intention of Messrs. Parry & Co. to file a petition to declare the firm

insolvent. Meanwhile Govindoss Krishnadoss, *alias* Babu, instituted a suit, O. S. No. 622 of 1923, first for partition and later upon amendment for a declaration that the family had become divided from 1890 and that the debts were incurred by him after his father's death. In this suit a Receiver was appointed on 31st August, 1923.

It was contended before Mr. Justice Waller and again in appeal that as the business of the firm ceased in April, 1923, the Court had no jurisdiction to make an order of adjudication in November, 1924. It is also contended that after the appointment of a Receiver any business carried on by the Receiver will not amount to a carrying on the business by the firm, as the Receiver is not an agent of the parties but an officer of Court, and that until he is discharged, no adjudication order can validly be made.

S. 11 (*d*) of the Presidency Towns Insolvency Act declares : " The Court shall not have jurisdiction to make an order of adjudication in the case of a petition against a firm of debtors unless the firm has carried on business within a year before the date of the presentation of the insolvency petition within those limits. " Whether a firm has carried on business or not within a year before the date of the filing of the insolvency petition is a question of fact in each case. But it is necessary first to determine what is meant by " carrying on business. " Is it the same as " being a trader " which is the expression used in S. 87 of the English Bankruptcy Act of 1869 ? Mr. Ramachandra Aiyar quoted the case of *Dawe* v. *Vergara* (1). That was a case where two persons, Ellery and Festing, traded together as wine merchants. Festing brought a suit for dissolution and himself took service in another company as a book-keeper. A Receiver was appointed to carry on the business. It was held that, after the appointment of the Receiver who took possession and carried on the business Festing was no longer a trader at the time when his goods were taken in execution. Mr. Ramachandra Aiyar also relied on the case of *Ex parte Blain, In re Sawers* (2), where it was held that the act of bankruptcy could not be committed by an agent and therefore that two partners of an English firm who were residing permanently in Chili could not be adjudicated bankrupts in an English Court of Bankruptcy. The explanation to S. 9 of the Presidency Towns Insolvency Act declares that the act of an agent may be an act of the principal

1. (1883) 11 Q B 241. 2. (1879) 12 Ch. D. 522.

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for the purpose of committing acts of insolvency even though the agent may have no specific authority to commit it. It was pointed out by me in *Kalianji Singhji Bhai* v. *The Bank of Madras* (3) that the law in England was not the same as that in India in this respect.

In *Goswami Shri Girdharji* v. *Shri Govardhan Lalji* (4) the Privy Council had to consider the meaning of the phrase "carry on business" and they observed that the phrase was an elastic one and almost incapable of definition. It was intended in the Letters Patent, where the phrase was used, to refer to business in which a man might contract debts and become liable to be sued by persons who had business relations with him. I am of opinion that the expression "carry on business" in the Presidency Towns Insolvency Act cannot be interpreted in the light of the Letters Patent or of the wording of the old English Bankruptcy Law with reference to traders, so that cases like *Dawe* v. *Vergara* (1), *Ex parte Schomberg* (5) and *Ex parte Salaman, In re Taylor* (6) do not help us to decide the meaning of the phrase "carry on business" in cases of insolvency. Under the old Bankruptcy Act of 1869 a firm could not be adjudicated insolvent in England, but this was made possible by the Bankruptcy Act of 1893 in which the expression "being a trader" was dropped and the expression "carrying on business" was substituted. As a married woman could not be made bankrupt unless she was carrying on a trade or business after her marriage the question has come up in connection with the Married Women's Property Act as to what is the meaning of "carrying on business" under the Bankruptcy Act. In *In re Dagnall, Ex parte Soan and Morley* (7) Vaughan Williams, J. observed that trading was not completed until all the obligations that the fact of trading imposed upon the trader were performed. The learned Judges declined to be bound by the earlier decisions such as *Ex parte Schomberg* (5) as to the meaning of the words in the Bankruptcy Act of 1888 "being a trader". Then in *In re Worsley* (8) Lord Alverstone, C. J. held that a woman who was carrying on business separately from her husband and sold that business must be deemed to be still carrying on the business so long as the debts she had incurred in the business

1. (1883) 11 Q B 241. 3. (1915) 29 M L J 788.
4. (1893) I L R 18 B 294 (P C).
5. (1874) 10 Ch. A 172. 6. (1882) 21 Ch. D. 394. 7. (1896) 2 Q B 407.
8. (1901) 1 Q B 309.

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remained unpaid. Reference is made by the learned Chief Judge to the case of *Ex parte Bamford* (9) where the Lord Chancellor laid down that so long as a trader did not pay the debts he had contracted while engaged in the trade he was to be regarded as still engaged in the trade. In *In re Clark : Ex parte Pope Owles* (10) a similar meaning was given by the three learned Judges of the Court of Appeal to the words " carrying on business " ; and in this Court in Petition No. 150 of 1916 our learned Chief Justice took the view that the meaning of " carrying on business " as understood by the Court of Appeal in England was the same in this country and that the language used by the English Court of Appeal was expressed in terms so general as to mean that, so long as there are debts of the business being discharged and assets being got in, a business must be regarded as still being carried on.

As regards the argument that the appointment of a Receiver prevented the order of adjudication being made, Mr. Justice Pollock in *Dawe* v. *Vergara* (1) implied that if Festing intended to reconstitute the business or carried it on after the Receiver was discharged, he would be a trader. It seems to me that the Legislature could not have intended that an insolvent firm should be allowed to evade its responsibilities and obligations by the device of one member of the firm bringing a suit against another member and applying to the Court to appoint a Receiver. It was also argued that Mr. Justice Waller's order declaring the firm insolvent was contrary to R. 47 of the Insolvency Rules which says that an order of adjudication shall be made against partners individually. I do not understand this rule as meaning that an order of adjudication shall not also be made against the firm. But if it has that meaning, it is at variance with the provisions of S. 99 of the Act, which speaks of adjudication orders being made against firms, and it may be *ultra vires*, as suggested by Mr. Grant. In *In re Wenham, Ex parte Battams* (11) Lord Alverstone observed that the rule of the Supreme Court in England under which a creditor was enabled to get a separate receiving order against each individual partner could not be held to cut down the rights and liabilities created by the sections of the Bankruptcy Act. In the present case there is no question that at the date of the petition the insolvent firm had business debts undischarged.

1. (1885) 11 Q B 241.
9. 15 Ves. Rep. 449.
10. (1914) 3 K B 1005.
11. (1900) 2 Q B 698.

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The objections taken to the order of Mr. Justice Waller thus fail, and the appeals of the two members of the firm must be dismissed with costs.

The respondents will get their costs out of the estate.

This order will have the effect of dissolving our order, dated 18th December, 1924, as to payment of Rs. 500 per mensem for the maintenance of the insolvents, and they may apply for what is necessary to the Official Assignee or to the Judge sitting in insolvency.

Ramesam, J. :—I agree.

T. S. V. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Kuppusami Aiyar and others ... *Appellants* in both the Appeals (Defts. 1 to 3)*

v.

B. Raja Rajeswara Sethupathi *alias* Muthuramalinga Sethupathi Avl. ... *Respondent in both the Appeals (Plaintiff).*

Kuppusami Aiyar v. Raja Rajeswara Sethupathi Avl.

Landlord and tenant—Rent due under a permanent lease granted under an agreement of compromise—Landlord's suit for—Maintainability—Suit prior by landlord against tenant inconsistent with compromise—Effect of—Dismissal of that suit—Relationship of landlord and tenant subsisting at date of suit for rent—Effect—Madras Local Boards Act, S. 73—Intermediate landholder—Road cess in respect of land held by—Liability for—Landholder's suit for recovery thereof from intermediate landholder—Maintainability—Limitation—Art. 120 *of Limitation Act.*

In 1894, the father of the plaintiff, the Rajah of Ramnad, gave a 40 years' lease to the 1st defendant of the suit village on *poruppu* (or favourable rent) of Rs 804 in consideration of his having rendered services to the Rajah's estate. In June, 1895, the plaintiff's father made an absolute and hereditary grant of the same village on *sarva maniam* tenure, *i. e.*, free from all liability for rent or tax. The Dewan trustee of the plaintiff's estate threatened to bring a suit to set aside the absolute gift of June, 1895. Thereupon in 1902 the Dewan trustee and certain Chetti lessees entered into an agreement of compromise with the 1st defendant by which the latter obtained a permanent lease of the village on payment of *poruppu* at the rate of Rs 402 a year instead of Rs 804 fixed under the lease of 1894, and the Dewan trustee gave up his intention of instituting proceedings to set aside the gift of the property made under the *sarva maniam* grant of 1895. Cl. 13 of the agreement of compromise provided that the parties and their representatives should conduct themselves in accordance with the provisions contained therein.

In 1913 the plaintiff brought a suit for recovering possession of the suit village on the ground that it had been obtained from his father as an absolute gift free from all payments or liabilities through undue influence. That suit

*Appeals Nos. 314 and 315 of 1922. 13th February, 1925.

was ultimately dismissed by the High Court on the ground that the plaintiff was bound by the agreement of compromise aforesaid.

In the same year 1913 the plaintiff instituted the suit out of which the appeal arose to recover quit rent (or *poruppu*) as well as road cess and rail cess and *mahamai* from the defendants. The defendants pleaded that, by bringing the suit to recover possession of the village, the plaintiff had shown his intention of not being bound by the compromise of 1902, and that, therefore, the defendants were entitled to treat the agreement as being rescinded and to refuse to pay *poruppu*.

Held, overruling the contention, that the suit was one for recovery of rent by a landlord, and that as the parties were in the relationship of landlord and tenant, the suit was maintainable.

If the defendants had relinquished possession of the village or if the Rajah had ceased to be the owner of the estate, there could be no suit for recovery of rent.

Held further, that the plaintiff was not disqualified from suing to enforce the terms of the compromise of 1902 by reason of the institution of his suit to recover possession, because the agreement was not of the nature of an executory contract, the consideration for it was executed, and there was no defeasance clause in it providing for divestment of the rights in the event of either party breaking any of the terms of the agreement.

Held, that the plaintiff was not entitled to interest on the arrears of *poruppu* till the date of the disposal by the High Court of his suit to recover possession.

Held also, that the defendant being an intermediate landholder, the plaintiff was, under S. 75 of the Local Boards Act, entitled to recover from him the whole of the tax paid in respect of the land held by him less half the tax assessable on the amount of the *poruppu* and that the limitation period for that was six years under Art. 120 of the Limitation Act.

Appeals against the decrees of the Court of the Subordinate Judge of Ramnad at Madura in O. S. Nos. 33 of 1917 and 53 of 1921 respectively.

R. Kesava Aiyangar for appellants.

T. R. Ramachandra Aiyar, L. A. Govindaraghava Aiyar, V. Muthuswami Aiyar, V. Sundaram Aiyar and *S. Sundararaja Aiyangar* for respondents.

The Court delivered the following

JUDGMENT :—These appeals arise out of suits brought by the Rajah of Ramnad to recover quit rent (or *poruppu*) as well as road cess and rail cess and *mahamai* from the defendants who are in occupation of the village of Nedunthulasi in Rajasingamangalam Taluk of the Ramnad Estate.

O. S. No. 33 of 1917, out of which Appeal No. 314 of 1922 arises, is a suit to recover what is due from the defendants for faslis 1321 to 1325. This suit stood over for decision pending the issue of a suit (O. S. No. 157 of 1913) brought by the plaintiff for recovering possession of the village of Nedun-

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thulasi, which he alleged had been obtained from his father as an absolute gift free from all payments or liabilities through undue influence. The claim of the Rajah to recover the village from the possession of the defendants was finally rejected by the judgment of the High Court in *Raja Rajeswara Sethupathi* v. *Kuppuswamy Aiyar* (1). The decision, to which one of us was a party, was dated 3rd May, 1921. After this, there was an attempt to obtain leave to appeal to the Privy Council, but leave was refused both here and in England. By our decision we held that the Rajah could not recover the village from the defendants, because he was bound by a compromise entered into during his minority by the trustee of his estate, Venkataranga Aiyar and certain Nattukottai Chetties, to whom the estate was leased. On September 14, 1894, the Rajah's father gave a 40 years' lease to the 1st defendant of the village of Nedunthulasi on *poruppu* (or favourable rent) of Rs. 804 in consideration of his having rendered services as a trusted gumastah of the estate. On 2nd June, 1895, the plaintiff's father made an absolute and hereditary grant of the same village on *sarva maniam* tenure, *i. e.*, free from all liability for rent or tax. On 24th April, 1902, the Dewan trustee of the estate and the Chetti lessees entered into an agreement with the 1st defendant, by which the 1st defendant obtained a permanent lease of the village on payment of *poruppu* at the rate of Rs. 402 a year instead of Rs. 804 fixed under the lease of 1894. The Dewan trustee gave up his intention of instituting proceedings to set aside the gift of the property made under the *sarva maniam* grant of 1895. Under this arrangement the defendants are bound to pay *poruppu* of Rs. 402-1-10 and *mahamai* and road cess every fasli.

The main defence to these suits is that the plaintiff, having brought O. S. No. 157 of 1913 to recover possession of the village, has shown his intention of not being bound by the compromise of 1902 and that therefore the defendants are entitled to treat the agreement as being rescinded and to refuse to pay *poruppu*.

Reliance is placed on cl. 13 of the agreement which runs thus : "As an arrangement has been effected in this manner and this agreement entered into, the said Kuppuswami Aiyar and his representative-in-interest, the said Dewan trustee Rao Bahadur Venkataranga Aiyar Avergal and his representatives-

1. (1921) 41 M L J 474.

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in-interest and the said lessees and their representatives-in-interest and the Rajah, who gets the said *Samasthanam,* shall conduct themselves in accordance with the provisions contained herein."

In *Srish Chandra Roy* v. *Banomali Roy* (2) there was a compromise of a suit under which one party acknowledged the title of the other as an adopted son and the other party promised to execute a lease of certain mouzahs, and afterwards the former party brought a suit to set aside the adoption and caused the other side to incur costs in litigation, and after having failed in this suit he sued for the specific performance of the agreement. The learned Judges of the Calcutta High Court (Hill, J. with whom was Brett, J.) held that the Court of First Instance rightly exercised its discretion in refusing to grant specific performance in favour of one party whose previous conduct had amounted to an abandonment of the agreement sought to be enforced. On appeal to His Majesty, the Judicial Committee confirmed the decision of the Calcutta High Court.

I think that there is a real difference between the facts of that case and the present one. The Calcutta High Court was dealing with a suit for specific performance, pure and simple. The present suit, which is before us in appeal, is a suit for recovery of rent by a landlord and the learned Judge in the Court below is mistaken when he speaks of it as a suit to direct the defendant to pay a certain amount. The suit would not be maintainable except on the footing that the parties are still in the relationship of landlord and tenant. If the defendants had relinquished possession of the village or if the Rajah had ceased to be the owner of the estate, there could be no suit for recovery of rent. At the time, when the trustee of the estate and the 1st defendant settled their disputes by the agreement of 24th April, 1902, the trustee was threatening to bring a suit to set aside the absolute gift of June 2, 1895. It was an amicable settlement of a disputed claim if the gift deed by the former Rajah had been declared in a suit brought for that purpose to be voidable owing to undue influence, the defendant would still have had a right to occupy the village on payment of *poruppu* of Rs. 80¼ under the 40 years' lease of 1894.

The parties compromised on the understanding that the 1st defendant should pay Rs. 402-1-10, as *poruppu, i. e.,* about

2. (1904) I L R 31 C 584 : 14 M L J 185 (P C).

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half the amount which he was paying previously. The agreement was not of the nature of an executory contract like that in *Srish Chandra Roy* v. *Banomali Roy* (2). Cl. (*viii*) of the agreement referring to Act VIII of 1865, which was then the rent law in force, provides that no pattas or muchilikas need be executed. The document was stamped as a permanent lease for a rental of Rs. 402 and a release of the rights under the gift deed of 1895. There was no defeasance clause providing for divestment of the rights in the event of either party breaking any of the terms of the agreement. The consideration was executed consideration, the trustee having abstained from bringing a suit for recovery of possession and the 1st defendant having agreed to pay *poruppu* of Rs. 402. In *Srish Chandra Roy* v. *Banomali Roy* (2) there was a promise to execute a lease of the suit mouzahs and in that respect, the agreement was executory ; but the settlement in the present case left nothing to be done by the parties in future except to pay and receive *poruppu* at the rate agreed upon.

When the plaintiff brought O. S. No. 157 of 1913 to recover possession of the village, the defendants, in their written statement para. 37, immediately asserted that they were no longer bound to pay *poruppu* under the terms of the agreement of 24th April, 1902, as the plaintiff had broken the agreement by bringing that suit. In that suit, however, neither party was willing to abide by the compromise. The defendants relied upon the absolute gift made by the Rajah's father and the plaintiff relied on that gift being voidable on account of undue influence. In the decision of the suit it was made clear that the contentions of neither party were correct and that both sides were bound by the settlement. As the settlement was not an executory contract, I am of opinion that the plaintiff is entitled to sue to enforce its terms and that he is not disqualified by having sued for a greater relief in O. S. No. 157 of 1913 as his previous claim that he was entitled to *poruppu* at the rate of Rs. 804 does not prevent him from now claiming that he can recover at least Rs. 402 per annum. The suit is thus distinguishable from that in *Srish Chandra Roy* v. *Banomali Roy* (2) which was a case of an executory contract and a suit for specific performance. In *Ganga Varapu Krishna Venamma* v. *Naraparaju Venkata Mukunda Rao* (3) where there was a compromise which finally settled the rights of the

2. (1904) I L R 31 C 584 · 14 M L J 185 (P C).
3. (1909) 7 M L T 33.

parties and nothing more had to be done to give effect to it, it was held by this Court, that the conduct of the executant in acting in a manner inconsistent with the compromise did not justify the other party in repudiating it, and *Srish Chandra Roy* v. *Banomali Roy* (2) was distinguished.

In this view the Lower Court was right in holding that the plaintiff was entitled to succeed and in giving him a decree for recovery of *poruppu* for the faslis in suit.

Two minor points remain to be decided. The Lower Court's decrees allow interest at 12 per cent. from the date of the suit till the date of the decree, and 6 per cent. thereafter till payment. During the pendency of O. S. No. 157 of 1913, and until the appeal was decided on 13th May, 1921, the defendant did not tender payment and the plaintiff did not demand it probably with the idea that, if he accepted rent, he would not be able to successfully impugn the defendants' title. On one occasion Rs. 10 was paid, not by the defendants, but by a friend named Venkatachari (*vide* Ex. X and the evidence of the 2nd defendant, D. W. 1). This payment will not affect the rights of the parties since it was not a transaction between themselves. The fact remains that during the pendency of the former litigation the plaintiff was unwilling to receive and the defendants were unwilling to pay (*vide* para. 5 of the plaint in O. S. No. 33 of 1917).

Under these circumstances, interest should not be charged until the former suit was finally decided by our decision in appeal on 13th May, 1921.

The Lower Court's decree will be amended by allowing interest only from 14th May, 1921. As regards road cess, the appellant claims that he is only liable to pay half the road cess, but it is clear from S. 73 of the Local Boards Act that, as he is an intermediate landholder, the landholder is entitled to recover from him the whole of the tax paid in respect of the land held by him less half the tax assessable on the amount of the *poruppu*. For this the limitation period is six years under Art. 120 [vide *Muthuramalinga Sethupathi* v. *Mahalinga Raju* (4)]. The appellant's contention fails.

Subject to the modifications above stated, the appeals are dismissed with proportionate costs.

A. S. V. *Appeals dismissed.*

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2. (1904) I L R 31 C 584 : 14 M L J 185 (P C).

4. (1918) 9 L W 287 at 288.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE KRISHNAN.

Pachaiyappa Chetti ... *Appellant** (*Defendant*)

v.

Sivakami Ammal ... *Respondent* (*Plaintiff*).

Pachaiyappa Chetti v. Sivakami Ammal.

Limitation Act of 1908, *S.* 10—*Applicability—Property vested in trust for a specific purpose—Meaning—Entrustment of money-lending business by* A *to* B—*Suit against* B's *legal representative by* A's *heir for account of property entrusted—Limitation—Alteration of purpose of trust—Conversion by* B *or his son of property entrusted—Effect.*

Plaintiff was the daughter of one *P* who, with his brother, formed an undivided family. They carried on money-lending dealings and entrusted their dealings to their brother-in-law, *S*, the father of the defendant. *S* continued those dealings for some time and maintained accounts for the moneys in his hands. In 1906 *P's* brother divided off from him and removed his share of the property from the hands of *S* who, however, continued to deal with the property of *P* until the latter's death in February, 1912, and even after that date remained in possession of all his property.

Shortly before his death *P* directed *S* to hold his property for the benefit of his wife and daughter (the plaintiff). *S* agreed to it and just before his death told his son, the defendant, to continue the arrangement and pay the ladies the moneys of *P* when wanted. At the time of his death *S* also informed the plaintiff and her mother that his son would continue to hold the property on their behalf. The bulk of the property originally entrusted to *S* was presumably money, and possibly promissory notes and bonds; there was no evidence that at that time any mortgages or immoveable property existed. The evidence showed that *P's* friends were subsequently lent out by *S* on bonds and mortgages taken either in his own name or in the name of the defendant.

The plaintiff, alleging that all the properties of her father were vested in *S*, and, after him, in his son, the defendant, in trust for her, sued the defendant for an account. The defendant, admitting that the properties vested in him, contended that they vested in him absolutely and that the plaintiff had no interest therein, and that the suit was barred by limitation. The contention of the defendant was found against, and that finding was not disputed in appeal.

Held, (1) that, in view of the pleadings and the course of trial in the Court below it was not open to the defendant to plead that the plaintiff had not proved an effective transfer of the properties; (2) and that S. 10 of the Limitation Act applied to the case and the suit was not barred.

The properties were originally vested in *S* in trust for a specific purpose, the trust being at the time one for the benefit of *P* himself. There were no mortgages or immoveable property at that time, and therefore no registered instrument of transfer was necessary, and the property would vest in *S* by the mere transfer of possession coupled with the intention of the parties that such delivery of possession should vest the property in *S*. On the conversion by *S* of the moneys and bonds into mortgages, such mortgages vested in him for the same purpose. The subsequent direction by *P* that the property should be held

*Appeal No. 192 of 1922. 20th January, 1925.

for the benefit of his wife and daughter was merely an alteration of the purpose of the trust. In both cases the property was held for a specific purpose and an express trust, within the meaning of S. 10, was undoubtedly created.

"Vesting" in S. 10—Meaning of.

Appeal against the decree of the Court of the Subordinate Judge of Vellore in O. S. No. 41 of 1921.

A. Krishnaswami Aiyar for appellant.

T. M. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENTS :—*Phillips, J.* :—The plaintiff in this case is the daughter of one Ponnambala Chetti, who, with his brother, Periyambala Chetti, formed an undivided family. They carried on money-lending dealings and entrusted those dealings to their brother-in-law, Sadayappa Chetti, the father of the present defendant. Sadayappa Chetti continued those dealings for some time and maintained accounts for the moneys in his hands. In 1906 the brothers, Ponnambala Chetty and Periyambala Chetty, effected a partition and the latter removed his share of the property from the hands of Sadayappa Chetty who, however, continued to deal with the property of Ponnambala Chetty until the latter's death in February, 1912, and even after that date remained in possession of all his property. The plaintiff now alleges that Sadayappa Chetty held all these properties in trust for her and has brought this suit against his son, the defendant, for an account. These facts are not disputed, but it is contended that the plaintiff's suit for an account is barred by limitation. The Subordinate Judge has, however, found that S. 10 of the Limitation Act is applicable to this case, and has given a decree. In appeal we are only concerned with the question of limitation, it being contended for the appellant that S. 10 is not applicable because the property of Ponnambala Chetty had not become vested for any specific purpose either in Sadayappa Chetty or in the defendant. The main point relied on in appeal is that the property never became vested in Sadayappa Chetty for any specific purpose ; and it is contended that as the property consisted of promissory notes, bonds and mortgage deeds, the provisions of S. 5 of the Trusts Act were not complied with, and no valid trust has been created. It is in evidence that shortly before his death Ponnambala Chetty directed Sadayappa Chetty to hold his property for the benefit of his wife and daughter ; and there seems to be no reason to disbelieve the oral evidence on this point, for, many witnesses speak to the fact and the discrepancies in their evi-

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dence are merely on matters of detail which is due to the fact that the witnesses are deposing to events which took place nine years ago. It is also alleged that when Sadayappa Chetty died in December, 1912, he informed the plaintiff and her mother that his son would continue to hold the property on their behalf. The arguments in appeal have been confined to the entrustment alleged to have been made by Ponnambala Chetty shortly before his death, and it is contended that, as some of the property consisted of mortgages which were immoveable property, no valid transfer was effected as there was no registered instrument of transfer, and consequently, the property did not vest in Sadayappa Chetty, and *a fortiori* did not vest in him for any specific purpose. This argument, however, ignores the pleadings in the suit. The plaintiff alleged that the properties vested in Sadayappa Chetty and after him in his son, the defendant, and were held in trust for her. The defendant admitting that the properties vested in him contended that the properties vested in him absolutely and that the plaintiff had no interest therein. This contention of the defendant has been found against and this finding is not disputed in appeal. It was therefore the case of both parties that the properties actually vested in the defendant. Consequently no evidence was let in as to the manner in which such vesting was effected, and consequently it hardly lies with the defendant now to plead that the plaintiff has not proved an effective transfer of the properties.

Apart from this, the whole of the appellant's argument has been confined to the period dating from Ponnambala Chetty's death ; but it is in evidence and is not disputed now that the property entrusted to Sadayappa Chetty was entrusted to him many years before Ponnambala Chetty died, the alleged trust being at the time one for the benefit of Ponnambala Chetty himself. The bulk of the property originally entrusted was presumably money and possibly promissory notes and bonds ; there is no evidence at all that at that time any mortgages existed. The transfer of the money and bonds, therefore, could be effected by delivery ; and if it was the intention of the parties that Sadayappa Chetty should hold the property as a separate fund to be accounted for by him to Ponnambala Chetty undoubtedly an express trust would be created. There being no immoveable property, so far as it appears from the record, no registered instrument of transfer would be necessary; and the property would vest in Sadayappa Chetty by the mere

transfer of possession coupled with the intention of the parties that such delivery of possession should vest the property in Sadayappa Chetty. The subsequent direction by Ponnambala Chetty that the property should be held for the benefit of his wife and daughter was merely an alteration for the purpose of the trust ; in both cases the property would have been held for a specific purpose. In this view of the case, undoubtedly an express trust within the meaning of S. 10 of the Limitation Act was created and, consequently, the plaintiff's present suit cannot be barred by limitation.

I do not therefore think it is necessary to ascertain in this suit whether the mortgage deeds had become vested in Sadayappa Chetty inasmuch as there is nothing to show that, when the entrustment was made, any immoveable properties, such as mortgages, were transferred. Their existence now can be explained by the fact that Sadayappa Chetty, dealing with the moneys of Ponnambalam Chetty, converted some of those moneys into mortgages ; and, if the money vested in him the proceeds thereof would similarly vest. Even if it were necessary to prove vesting, it is possible that the view taken by the late Chief Justice in *Kistappa Chetty* v. *Lakshmi Ammal* (1) that the word 'vesting' means merely 'properly having control of the property' would be sufficient to dispose of the case, but, as I am of the opinion that the parties did not go to trial on this question of vesting, the defendant having admitted that the property vested in him, it is unnecessary to further discuss this question ; and I need not refer to the various authorities, English and Indian, which have been referred to in the course of the argument, an argument which was largely beside the point with reference to the pleadings in the case.

The appeal therefore fails and is dismissed with costs.

Krishnan, J.

Krishnan, J. :—The defendant, the appellant in this appeal, is the husband of the plaintiff. The plaintiff sues him for an account and for payment over of the moneys which she alleges her father Ponnambala Chetty entrusted to his brother-in-law Sadayappa Chetty, defendant's father, which on his death passed into the hands of the defendant. Defendant denied the entrustment and pleaded that pro-notes and mortgage bonds in his name were his own property and raised several legal pleas and further contended that the suit was barred by limitation. In answer to the last plea plaintiff contended that her case fell within S. 10 of the Limitation Act and no

1. (1923) 44 M L J 431 at 433.

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limitation applied to it. The Subordinate Judge overruling the defendant's pleas passed a decree in plaintiff's favour and the defendant has appealed to us. The only point raised in the appeal is the one of limitation, the learned vakil for the appellant expressly stating that he gave up all other points. The question we have to decide is thus confined to whether S. 10 applies on the facts of this case. It is clear from the evidence that Ponnambala Chetty and his brother, who were carrying on money-lending business in Thiruvannamalai but living in a small village near by, being apprehensive of the safety of their property, purchased a house in Thiruvannamalai, and gave it to their brother-in-law Sadayappa Chetty to live in, free of rent, and transferred their funds to him and got him to transact their business on their behalf in his own name keeping separate accounts for the same. He was to render accounts and hand over the moneys and profits when demanded. Ponnambala's brother subsequently divided off from him and obtained from Sadayappa his half share in those moneys and in the house. But Sadayappa continued to act for Ponnambala till the latter's death in 1912. There is a body of evidence which there is no reason to discredit that just before his death early in 1912 Ponnambala instructed Sadayappa to continue the business as before and hold the moneys for the benefit of his wife and daughter, the plaintiff ; Sadayappa agreed to it and acted accordingly. Sadayappa also died at the end of the year 1912 and it is in evidence that just before his death he told his son the defendant to continue the arrangement and pay the ladies the moneys of plaintiff's father when wanted. Plaintiff's mother brought a suit against her son-in-law, the defendant, and got a decree for the transfer to her of a number of pro-notes and bonds standing in the defendant's name but found to have been taken with her husband's money. Plaintiff has brought this suit after her mother's death for an account of all the moneys belonging to her father which the defendant collected and had not hitherto accounted for and for payment over.

On these facts the plaintiff contends that Sadayappa was an express trustee in whom moneys were vested by her father for the specific purpose of carrying on his money-lending business improving the estate and handing over the capital and profits to him on demand, a purpose which was afterwards changed by her father into a similar one in favour of herself and her mother ; she, therefore, pleads S. 10 applies. The

defendant pleads that there is no proof that any funds of the plaintiff's father were vested in his father and even if so vested he says they were not vested for any specific purpose and S. 10 could not apply. According to him his father was only an agent of the plaintiff's father and as such an agency came to an end with his death in 1912 and the suit is barred by limitation.

Although the evidence on the point is somewhat meagre as to what actually took place when Sadayappa was installed in the newly purchased house in Thiruvannamalai, there is evidence to show that the funds of the plaintiff's father's money-lending business were thereafter kept by Sadayappa and were lent out by him on bonds and mortgages taken either in his own name or in the name of his, son, the defendant. Ex. KKK, the account produced, and the other documents referred to by the Subordinate Judge in his judgment prove this. It is true that some bonds were taken in Ponnambala's name and Ponnambala at times sent chits to Sadayappa for loans to be given to borrowers. But these circumstances do not interfere with the inference that Sadayappa was made a trustee and was not a mere agent. If he was only an agent he would not have taken bonds in his own and in his son's name for moneys got from Ponnambala. The near relationship of the parties, the fact that Sadayappa dealt with Ponnambala's moneys as if they were his own and took bonds in his and his son's name for such moneys when lent, the fact that he kept a separate account for these funds, the evidence as to what took place at Ponnambala's and Sadayappa's deaths, all point to the fact that Sadayappa was not a mere agent but was in reality a trustee. There is no force in the argument that the properties were never properly vested in the defendant's father by Ponnambala. In fact, the defendant's case in the Lower Court was not merely that the properties were vested in his father and after his death in him but that they were actually his own properties. The plea now taken that the properties were not vested in the father is not consistent with that position. The funds were all apparently in the shape of moneys which had only to be handed over to the defendant's father with the intention of passing the property to him to vest them in him. If there were any pro-notes or bonds in Ponnambala's name at the time which required endorsement or assignment in writing to transfer, they were evidently subsequently realised and converted into moneys and taken by Sadayappa as no such notes or bonds exist now. Such taking with Ponnambala's consent would vest these funds in Sadayappa. The conten-

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tion that a registered instrument was required to create a trust with reference to immoveable property like a mortgage interest is of no avail here as it is not shown that at the time the funds were vested in Sadayappa any portion of them consisted of mortgage securities. The mortgage bonds that now exist were taken in defendant's name by his father for moneys lent out by him which were already vested in him though they were originally part of Ponnambala's estate. I have no doubt that Ponnambala's money were legally vested in Sadayappa in trust. The evidence also shows that the specific purpose of the trust was to carry on money-lending with those moneys and to increase the estate by addition of profits by way of interest and hand over when called on to Ponnambala. It was clearly open to Ponnambala, the funds being already vested in Sadayappa, to alter the purpose of the trust by merely directing him to hold them for the benefit of his wife and child as he did just before his death. It seems to me that all the conditions necessary for the application of S. 10 of the Limitation Act exist in this case and the Subordinate Judge was right in overruling the plea of limitation, as under S. 10 the defendant, as the legal representative of the trustee, is equally barred from pleading the statute.

As this case turns on the facts proved here which clearly bring it within the section it is not necessary to refer to any authorities on the exact meaning of the section. The case cited in *Krishna Pattar* v. *Lakshmi* (2) to which I was a party is clearly distinguishable as that was a case of a constructive trust. The case in *Bhurabhai* v. *Bai Ruxmani* (3) is more in point.

I agree that the appeal fails and should be dismissed with costs.

A. S. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE KRISHNAN.

B. R. Sawmy Rao ... *Appellant** (*Mortgagee—Respondent*)

v.

F. H. Wilson, The Official Assignee of Madras ... *Respondent* (*Petitioner*)

B. R. Sawmy Rao v. The Official Assignee of Madras.

Civil Procedure Code, O. 2, R. 2—Mortgage—Separate covenants for interest and principal—Demand necessary for latter—Letter demanding interest

* O S Appeal No. 46 of 1924. 6th February 1925.

2. (1921) I L R 45 M 415 : 42 M L J 119. 3. (1908) I L R 32 B 394.

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—*Suit for interest alone—If bars subsequent suit for principal—Insolvency of mortgagor—Application by Official Assignee to have mortgage declared invalid — O. 2, R. 2 if applies.*

A mortgage document contained a clause that the mortgagors would pay the interest regularly within the 5th day of every month and then continued to provide that the mortgagors and their heirs would pay the principal and interest due thereunder to the mortgagee and his heirs whenever demanded, and "in default of our paying so, you and your heirs shall legally proceed..........and realise the amount." The mortgagee sent a letter demanding interest and therein stated that if the demand was not complied with, he would instruct his vakil to recover not only the interest but the principal also. This was followed up by a suit for interest based on the personal covenant alone and thereafter the mortgagor became insolvent. The Official Assignee then applied to the Insolvency Court for a declaration that the mortgage was unenforceable. *Held*, the covenants for principal and interest were separate and independent, and whereas a demand was necessary in order to make the former becoming due, no demand was necessary in the case of the latter. As the letter demanding interest was only a threat that proceedings would be instituted for recovering the principal also and did not by itself constitute a demand for the principal, the mortgage amount had not become payable at the time the suit for interest was filed and hence O. 2, R. 2 would not bar a second suit on the mortgage. *Kishan Narain* v. *Pala Mal*, (1922) I L R 4 Lah 32 (P C) and *Muhammad Hafiz* v. *Muhammad Zakariya*, (1921) I L R 44 A 121 (P C) followed.

Held also, the Insolvency Court had no jurisdiction to grant such a declaration, as O. 2, R. 2 would not apply unless the mortgagee brought a suit to enforce his mortgage.

On appeal against the order, dated the 15th April, 1924, of the Hon'ble Mr. Justice Waller passed in the exercise of the Ordinary Original Insolvency Jurisdiction of the High Court in I. P. No. 195 of 1923 in the matter of P. Thirumurthi Chetty, an insolvent.

Vere Mockett instructed by *Grant* and *Greatorex* for appellant.

R. N. Aingar and *K. S. Narayana Aiyangar* instructed by *Varadaraja Mudaliar* for respondent.

The Court delivered the following

JUDGMENTS :—*The Chief Justice* :—This raises a matter of some little interest. The learned Judge came to the conclusion to which he felt himself constrained to come with obvious and natural reluctance. I confess that I do not see any particular difficulty about this case when the documents are looked at carefully.

Coutts Trotter, C. J.

The case gives rise to a question as to the construction of O. 2, R. 2, an enactment peculiar to Indian Law and an enactment, the supposed benefit of which I have never been able even to guess at or to make the slightest suggestion of what benefit it would be to anybody at all. The effect of it is said to be that the mortgagee in this suit having sued for an instal-

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ment of unpaid interest on his mortgage was to be held thereafter debarred from recovering the principal. That would not carry the respondent all the way because what he has done here is not to raise this matter by way of defence to a suit on the mortgage or anything of the kind but to go boldly to the Court of Insolvency and ask for a declaration that the mortgage is dead, cancelled. In any event, whatever be the true effect of O. 2, R. 2, he cannot go to that length and, if it were necessary to decide on that ground alone, I should be prepared to allow this appeal on the ground that the learned Judge had no jurisdiction, on an application of the Official Assignee, to make any such declaration. However, I think it can be decided on a better ground than that.

The line of demarcation between the two classes of cases that arise is clearly drawn by the judgment of the Privy Council in the case of *Kishan Narain* v. *Pala Mal* (1) and what the Board says is this : " If the plaint originally brought came to be properly interpreted as claiming only a personal relief in respect of the unpaid interest, the appellant's case would be on surer ground;" and further "it does not appear to their Lordships that if the mortgage had provided, as mortgages always do in this country, for an independent obligation to pay the principal and the interest, that in a suit brought to obtain a personal judgment in respect of the interest alone the rule would have prevented a subsequent claim for payment of the principal." That is the guiding principle that the Board has laid down for us. Now, what of this instrument ? It seems to me perfectly clear that there is an independent covenant for the payment of interest and that the principal actually becomes payable not on failure to pay a current instalment of interest but on failure to comply with the demand to pay the interest and interest and principal due together. There is no proviso here, which I quite agree might make all the difference, that the failure to pay an instalment of interest shall make the whole principal amount due. I take it, though it is not necessary to decide the point, that in such a case very likely O. 2, R. 2 might apply. But, as I say, here there is an independent covenant to pay interest and it is on that I have scrutinised the pleading in the Small Cause Court suit very carefully and it is quite obvious that the suit was brought on a personal covenant and a personal covenant alone to pay interest and the plaints carefully abstain from asking for any sort of charge upon or

1. L R (1922) 50 I A 115 : I L R 4 Lah. 32 : 44 M L J 123 (P C).

other remedy against the mortgaged property ; and the defence was an unsuccessful attempt to force the plaintiff into the position of saying that he was claiming in a matter which involved an adjudication as to immoveable property—an attempt which properly failed.

Then the next thing—and it is apparently the ground on which the learned Judge went in making this order—is that the letter of the 28th December, 1921, which demanded the interest was of itself also a demand for the principal. That argument is one that I fail to appreciate. It is no use setting out the letter. There is an unquestioned demand for the interest and what follows is a warning that, if that demand is not complied with, the vakil will be instructed to recover not only the interest but the principal. How a threat to make a demand can be construed as being in itself to be a demand passes my comprehension and I am free to say on that part of Mr. Aingar's argument that I have been totally unable to appreciate it.

On these grounds I think that the learned Judge's order is wrong and must be reversed with costs here and below on the Original Side scale.

Krishnan, J. :—This is an appeal against an order passed by Waller, J., sitting in the Insolvency Court, on an application made by the Official Assignee to have a mortgage in favour of the appellant before us declared invalid.

The learned Judge has passed an order in those terms. The reason given for the order is this : The mortgagee, it seems, brought a suit in the Small Causes Court, Madras, for the interest due under the mortgage bond for some months. It is claimed that because of that circumstance, the mortgagee's right to sue for the principal is barred by O. 2, R. 2 of the Code of Civil Procedure and therefore the Official Assignee is entitled to be given a declaration that the mortgage is defunct. To start with, there is the difficulty in the way of this application, that O. 2, R. 2 does not apply unless the mortgagee brings a suit to enforce his mortgage, as the rule merely bars a second suit. The question will arise only in a second suit brought by the mortgagee and not in an application brought by the Official Assignee in the Insolvency Court as representing the insolvent mortgagor. In the second place, if we look at the mortgage bond, it clearly contains separate covenants as regards payment of interest and of principal. It provides that

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the mortgagors "shall pay the interest of the said debt every month within the 5th of that month, commencing from the 5th of the current month, May, 1921." It then goes on to provide that the mortgagors and their heirs shall pay the principal amount Rs. 5,000 and the interest due therefor to the mortgagee or his heirs whenever demanded. It is quite clear that here we have two independent covenants; and it leaves it open to the mortgagee to call in his mortgage money whenever he likes or to leave it under mortgage with the mortgagors; but the right to get the interest every month is specifically provided for and requires no demand whatsoever, for interest is payable independently of demand on the 5th of every month. The sentence that follows these two clauses in this mortgage deed is this: "In default of our paying so, you and your heirs shall legally proceed upon us and on our heirs and on the mortgaged properties mentioned in the Schedule A below and on our other properties and shall realise the amount." It is contended that the words "in default of our paying so" should be taken to mean "in default of our paying either the interest in the first clause or the principal amount and interest as in the second clause on demand." I am unable to agree with this contention. I think the words "in default of our paying so" clearly has reference only to the second clause, namely, on the failure to pay the amount of the principal and interest after demand. No demand was necessary to bring a suit for the interest. A suit for interest was brought by the mortgagee in the Small Causes Court not against the property itself but to get a personal decree against the mortgagors. The fact that he brought that suit before demanding the principal cannot prevent a subsequent suit being brought for the principal amount of money after demand. If, as held by Waller, J., a demand had already been made for the principal money before the suit in Small Causes Court had been brought and the principal amount and interest had both become payable by the time, O. 2, R. 2 would apply to the second suit by the mortgagee; but that contention fails in this case because I agree with the learned Chief Justice that Ex. B does not amount to a demand for the payment of the principal amount at all. It is as explained by His Lordship only a threat that proceedings would be taken through a vakil for the purpose of recovering the principal as well if the interest is not paid; the vakil, if he is instructed, will have to take the necessary steps under the bond to realise the money and the first step

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which he would have to take would be to make the necessary demand under the deed, so that with all respect to Waller, J., Ex. B cannot be construed in my opinion as tantamount to a demand for the principal. In this view, at the date when the Small Cause suit was brought, the principal amount of the mortgage money had not become payable, the mortgagee not having exercised his option of calling it in. O. 2, R. 2 then would not apply even in the case of a second suit on the mortgage.

The point whether O. 34, R. 14 has not got a bearing on this question has not been argued and, therefore, I do not wish to express any opinion on that point.

The law as to the applicability of O. 2, R. 2 has been laid down by the Privy Council in the cases referred to before us, namely, *Kishen Narain* v. *Pala Mal* (1) and *Mahomed Hafiz* v. *Mahomed Zakariya* (2). In the latter case, as Lord Buckmaster explained, where there is a provision in the mortgage deed for the payment of interest different from that as to the payment of the principal, making two independent covenants, if a personal action is brought on the covenant for the payment of interest and a decree is obtained, that would not prevent a subsequent suit being brought for the mortgage money and O. 2, R. 2 would have no application. That is exactly this case here. O. 2, R. 2 will apply only if at the date of suit both the principal and interest had become payable.

In these circumstances, I agree with the learned Chief Justice that this appeal must be allowed with costs as against the Official Assignee.

T. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE VENKATASUBBA RAO.

Valluru Appalasuri and others... *Appellants** (*Defts.* 2 *to* 4)

v.

Sasapu Kannamma Nayuralu ... *Respondent* (*Plaintiff*).

Appalasuri v. Kannamma Nayuralu.

Hindu Law—Widow—Co-widows—Alienation by one of—Binding character of, against other widow—Alienation for justifiable purposes—Effect—Death of alienating widow—Suit by survivor to recover property from alienee—Aliena-

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*S A No. 1061 of 1922. 5th February, 1925.

1. L R (1922) 50 I A 115 : I L R 4 Lah. 32 : 44 M L J 123 (P C).
2. (1921) I L R 44 A 121 : 42 M L J 248 (P C).

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tion if good to extent of alienor's share—Subrogation—Alienee's right, as regards portion of purchase money utilised for discharging husband's debts—Debt not charged on estate—Effect—Co-widows—Suit for partition by one of—Death of defendant—Amendment of plaint by adding prayer for recovery of entire property—Permissibility—Events subsequent to suit—Court if and when can take notice of—Amendment of plaint so as to include relief on foot of.

One of two co-widows cannot, without the consent of the other, alienate the latter's share of her husband's property even for purposes beneficial to the estate. The decision in *Kalliyanasundaram Pillai* v. *Subba Moopanar*, 11 M L J 139 is to be explained on the ground that the Judges were of opinion, on the facts of that case, that the senior widow was recognised as manager or agent of the other. Such an inference can be made only in a case where there is no known hostility between the widows and is not possible when the widows are hostile to each other.

The plaintiff, one of two widows, sued for partition of her husband's property and possession of her share. The defendants were, *inter alia*, the other widow and a person to whom she had sold a portion of her husband's property for discharging a decree obtained by a third party against her husband. The defendant-widow died pending the suit, and the plaintiff applied for an amendment of the plaint by inserting a prayer for possession of the entire estate, as the result of her death. The Court below allowed the amendment and granted a decree to the plaintiff for possession of the entire property.

On appeal by the alienee, *held*, (1) that the sale to him was not binding even to the extent of the share of the deceased widow ; (2) that he was not entitled to be paid the portion of the purchase money which was utilised for discharging the husband's decree debt ; and (3) that the amendment of the plaint so as to enable the plaintiff to claim the whole of the property including the share of the deceased widow was, in the circumstances of the case, rightly allowed.

The decree against the husband was not a mortgage debt in which case the alienee might have been entitled to claim the amount paid by him to discharge the debt by subrogation.

Any right by contribution against the plaintiff's half share could be operative only during the lifetime of the deceased widow and not after her death so as to affect plaintiff's right by survivorship. Neither S. 69 nor S. 70 can help the alienee.

Events that happen even after the filing of the suit, including those that add to the title of the plaintiff, may be taken notice of and an amendment of the plaint for including a prayer for relief on the foot of such events ought, as a general rule, to be allowed to avoid multiplicity of proceedings.

Co-widows—Estate of—Nature of—Partition between them—Effect—Alienation by one of them—Rights of alienee under—Effect on surviving widow or reversioners—Review of cases with regard to.

Second appeal against the decree of the Court of the Additional Subordinate Judge of Vizagapatam in A. S. No. 439 of 1921 (A. S. No. 378 of 1921 on the file of the District Court of Vizagapatam) preferred against the decree of the Court of the District Munsif of Rajam in O. S. No. 100 of 1916.

Y. Suryanarayana for appellants.

B. Jagannadha Doss for respondent.

The Court delivered the following

JUDGMENT :—This Second Appeal arises out of a suit by one of two Hindu widows for partition of her husband's property and possession of a share. The 1st defendant is the co-widow and she sold a part of the property under Ex. IV to the 2nd defendant who married the daughter of a deceased co-wife of plaintiff and 1st defendant, and another part to the 3rd defendant under Ex. VI. The 4th defendant is the undivided brother of the 3rd defendant. The 1st and 2nd defendants lived in the same house. The District Munsif decreed the suit. On appeal, the Subordinate Judge remanded the suit for fresh trial. On remand, the District Munsif again passed a decree in favour of the plaintiff. In the interval the 1st defendant died. There was again an appeal to the Subordinate Judge. The plaintiff prayed for an amendment of the plaint and prayed for possession of the entire estate as the result of the 1st defendant's death. The amendment was allowed. The Subordinate Judge granted a decree to the plaintiff for possession of the entire property. The defendants 2 to 4 appeal.

The portion of the case relating to the alienations in favour of defendants 3 and 4 has not been seriously pressed and the other portion relating to the 2nd defendant has been fully argued.

The Subordinate Judge found that out of the Rs. 600 for which Ex. IV was executed, Rs. 516 was utilised to discharge a decree obtained by D. W. 6 against the husband (Ex. V). If the sale was effected by both the widows, it would have been for purposes beneficial to the estate and therefore binding on the daughter and other reversioners. The appellant's vakil contended, relying on *Kalliyanasundaram Pillai* v. *Subba Moopanar* (1) that the sale ought to be upheld against the plaintiff. In *Sri Gajapathi Radhamani* v. *Maharani Sri Pusapati Alakajeswari* (2) and *Vadali Mamidigadu* v. *Kotipalli Ramayya* (3) it was held that one of two co-widows cannot alienate the share of the other even for purposes beneficial to the estate without the consent of the other. The decision in *Kalliyanasundaram Pillai* v. *Subba Moopanar* (1) decid-

1. (1902) 14 M L J 139. 2. (1892) I L R 16 M 1 (P C). 3. (1902) I L R 26 M 334

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ed by Benson and Bashyam Aiyangar, JJ.[the same Judges who decided *Vadali Mamidigadu* v. *Kotipalli Ramayya* (3)] is apparently inconsistent with this, but, on a careful examination of the judgment, it seems to me that the Judges were of opinion on its facts, that the senior widow was recognised as manager or agent of the other. Such an inference can be made only in a case where there is no known hostility between the widows and is not possible when the widows are hostile to each other as in this case. We therefore agree with the Courts below in holding that Ex. IV is not binding on the plaintiff's half share.

The next point that has been argued in the case is that Ex. IV is at least binding on the 1st defendant's half share. The appellants rely on the unreported judgment of this Court in A. S. No. 166 of 1922. The position of two co-widows or two daughters has been the subject of consideration in several decisions of the various High Courts and the Privy Council. In *Rindamma* v. *Venkataramappa* (4), Bittleston, C. J. and Ellis, J. observed: "Upon the death of the husband the widows became jointly entitled; they might agree to divide the estate and hold separately distinct shares of it *during their joint lives*. We are not prepared to say they might not enter into such an agreement as would bind each to an absolute surrender of all interest in the other's share, *so as to let in the next heirs of the husband* immediately upon the death of that other. . . . . One obtained a decree against the other for a division. . . . It dealt only with the joint estate, and the joint estate ceased on the death of Krishnamma. Then the whole estate of the husband vested in the surviving widow ; and neither Krishnamma's claim for division nor the decree for division could touch that." In another case *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (5) Scotland, C. J. and Ellis, J., observe : " Now, the right as contended for on behalf of the appellants, namely, to the absolute partition of the joint estate, giving to each widow a share in severalty, we are of opinion is not maintainable. In support of it reliance was placed on the language of the foregoing texts . . . . The division there spoken of must be understood to refer only to the *distributive enjoyment of the benefits* of the joint property; and no doubt, two or more widows might by an agreement *inter se not prejudicial to the rights of the next heir in succession* provide for such

3. (1902) I L R 26 M 334. 4. (1866) 3 M H C R 268.
5. (1868) 3 M H C R 424 at 452.

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enjoyment by an apportionment of the property. A partition converting the joint estate into an estate in severalty whenever either of the widows choose to insist upon it, is quite incompatible with the right of survivorship to the whole property arising out of the joint estate for life and the surviving widow or widows being the nearest heir or heirs of the husband. On the other hand, it has been recently decided by this Court in the case of *Rindammav.Venkataramappa* (4) that a division obtained under a decree was ineffectual against the claims of the survivor of two widows to the divided moiety." They then consider the question whether the relief of separate possession of a portion of the inheritance may not be granted, when it appears to be the only proper and effectual mode of *securing the enjoyment of her distinct right* to an equal share of the benefits of the estate. This case has been approved by the Privy Council in *Gajapathi Nilamani* v. *Gajapathi Radhamani* (6). At p. 300 their Lordships say: " It was held there that there was no objection to a transaction which was *merely an arrangement for separate possession and enjoyment,* leaving the title to each share unaffected ; although *the widows nevertheless remained coparceners* with a right of survivorship with them, and *there could be no alienation* by one without the consent of the other ....Their Lordships, guarding themselves against being supposed to affirm by this order that either *widow has power to dispose of the one-fourth of the estate* allotted *to her, or that they have any right to a partition in the proper* sense of the term, are not disposed to vary. " In *Kathaperumal* v. *Venkabai* (7) it was observed : " But by Hindu Law two widows of one and the same husband take *a joint interest in one undivided estate,* and it has been held that, although the widows may arrange for the enjoyment of the estate in separate portions, there can be no compulsory partition converting the joint estate into an estate in severalty. " In *Ariyaputri* v. *Alamelu* (8) we have : "It is true that when there are more widows than one, they take together as a class. It is also true that partition is permitted between them not *as in the case of male co-parceners for the purpose of converting a joint estate into two or more separate estates to be held in severalty, but for the limited purpose of securing to each widow a distributive enjoyment of the benefit of joint property.* In this

4. (1866) 3 M H C R 268. 6. (1877) I L R 1 M 290 (P C).
7. (1880) I L R 2 M 194. 8. (1888) I L R 11 M 304.

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view partition between them certainly creates no separate property in the portions placed in their separate possession and no disposing power so as to defeat the right of survivorship vesting in the co-widow, but *as between them*, each widow is entitled to take the income of the portion placed in her possession during her life." In *Sri Gajapathi Radhamani* v. *Maharani Sri Pusapati Alakajeswari* (2) which arose out of the facts of *Gajapathi Nilamani* v. *Gajapathi Radhamani* (6) their Lordships of the Privy Council observed at page 10 : "It may be assumed for the present judgment, without deciding the point, that there was a sufficient necessity for borrowing money to pay the Government revenue, or even for the payment of Nilamani's debt, but that necessity did not render a mortgage by one widow binding upon the joint estate which had descended from their deceased husband, so as to affect the interest of the surviving widow." One may add "or that of the reversioners" though this was not necessary for the case [see *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (5) already quoted]. It is well to remember that, in that case, part of the money borrowed by the alienating widow was applied for paying Government revenue, and still no decree even for this amount was given. The case in *Kailash Chandra Chuckerbutty* v. *Kashi Chandra Chuckerbutty* (9) is a case of daughters but, as observed in *Ramakkal* v. *Ramaswami Naicken* (10) to be next referred to, the case is analogous to that of widows. Nor does the fact that the Calcutta case was under the Dayabhaga Law make any difference as observed in *Ammani Ammal* v. *Periaswami Udayan* (11) by Oldfield, J. It was there observed: "That being so, the estate that devolved on the daughters of Radhakrishna would not determine until after the death of Gaganeswari and until that event happens, the arrangement come to between the daughters, which was assented to by all the daughters, should in our opinion remain in operation. *This would not in any way interfere with the rights of the reversionary heirs* for the simple reason that those rights do not come into existence until after the death of Gaganeswari............As we have already indicated, its effect was to make the properties allotted to each daughter remain her property capable of being alienated by her, and if not alienated, capable of passing on her death to the heirs of

2. (1892) I L R 16 M 1 (P C). 5. (1868) 3 M H C R 424 at 452.
6. (1897) I L R 1 M 290 (P.C). 9. (1897) I L R 24 C 339.
10. (1899) I L R 22 M 522: 9 M L J 101. 11. (1923) 45 M L J 1 at 4.

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her separate property as distinguished from the property inherited by her from her father." In *Ramakkal* v. *Ramaswami Naicken* (10) it was held that one of two widows can alienate any estate which came to her as such for her life and can therefore enter into such a deed as will preclude her from recovering *during her life* property which she has alienated, to the full extent of such alienation, *provided it does not extend beyond her life interest.* In *Kanni Ammal* v. *Ammakannu Ammal* (12) it was held that, while one of two daughters cannot by any alienation alter the character of the daughter's estate so far as concerns the right of survivorship or the rights of reversioners, she may alienate her interest in the property. The parties in that case were ably represented as two of the vakils for the appellant and two vakils for the respondent have since become Judges of this Court and a full report of the argument is available and is instructive. It shows that there may be two kinds of partition between two widows or other co-heiresses : (1) so as to last during their joint lives only and if one dies the other gets it by survivorship; and (2) so as to last until the death of all. If one dies first, the other does not get her share by survivorship and the share will continue to be enjoyed by the alienee, if alienated, or will go to the heirs of her stridhanam property, if unalienated. In either case the partition is an arrangement for their own convenience and cannot affect reversioners.

In *Chengappa* v. *Buradagunta* (13) and *Ammani Ammal* v. *Periaswami Udayan* (11) (in which one of us, Venkatasubba Rao, J., took a part) the remark in *Rindamma* v. *Venkataramappa* (4) quoted by me that the arrangement may be such that, after partition by the co-widows, the death of one may let in the reversioner's right, was disapproved, *i. e.,* the reversioner's interest does not begin until all the widows die (unless there is a surrender by all).

The decisions establish that (1) the estate of co-widows or other co-heiresses in Hindu Law is a joint estate but it is unlike other joint estates. It is indivisible [see *Kathaperumal* v. *Venkabai* (7)]. Strictly it can never be divided so as to create separate estates such that each sharer is the owner of her share and at her death the reversioner's estate falls in.

4. (1866) 3 M H C R 268. 7. (1880) I L R 2 M 194.
10. (1899) I L R 22 M 522: 9 M L J 101.
11. (1923) 45 M L J 1.
12. (1899) I L R 23 M 504 : 10 M L J 253.
13. (1920) I L R 43 M 855 : 39 M L J 567.

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Such a division is impossible in law. (2) Such partition as is permissible is merely for the convenience of their enjoyment by the sharers ; and may be of two kinds : (*i*) so as to last during the lifetime of both the widows; and (*ii*) so as to bind them until the death of all of them. In the latter case if one of the widows dies before the other without alienating the property, it passes to the heirs of her private property and not to the other co-widow or their reversioners, the dictum to the contrary in *Rindamma* v. *Venkataramappa* (4) not being good law [*Ammani Ammal* v. *Periyaswami Udayan* (11) and *Chengappa* v. *Buradagunta* (13)]. (3) By the very nature of the arrangement, there can be no survivorship if the partition is of the second kind. But if it is of the first kind, it cannot affect the right of survivorship of the other. (4) One of the co-widows can alienate her share which may be defined or undefined according as there is a partition or not. If the alienor dies before the co-widow, the alienation ceases to be operative if there is no partition, or, if the partition is of the first kind, the property goes to the co-widow by survivorship. But if the partition is of the second kind, the property continues to be enjoyed by the alienee [*Ramakkal* v. *Ramaswami Naicken* (10), *Kanni Ammal* v. *Ammakannu Ammal* (12) and *Ammani Ammal* v. *Periaswami Udayan* (11)] until the other co-widow dies. The *obiter dictum* to the contrary in *Durga Dat* v. *Gita* (14) has not been followed here. (5) Except for the limited purposes mentioned above, *i. e.*, during the lifetime of the alienee in a partition of the first kind or during the lifetime of all the co-widows in a partition of the second kind, there can be no alienation by a widow of her interest [*Gajapathi Nilamani* v. *Gajapathi Radhamani* (6) and *Sri Gajapathi Radhamani* v. *Maharani Sri Pusapati Alakajeswari* (2)] and *whether there is necessity or not*, an alienation by one co-widow cannot bind the reversioner *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (5), *Kailash Chandra Chuckerbutty* v. *Kashi Chandra Chuckerbutty* (9), *Ramakkal* v. *Ramaswami Naicken* (10), *Kanni Ammal* v. *Ammakannu Ammal* (12) and *Durga Dat* v. *Gita* (14). (6) If an aliena-

2. (1892) I L R 16 M 1 (P C).
4. (1866) 3 M H C R 268.
5. (1868) 3 M H C R 424 at 452.
6. (1878) I L R 1 M 290 (P C).
9. (1897) I L R 24 C 339.
10. (1899) I L R 22 M 522 : 9 M L J 101.
11. (1923) 45 M L J 1.
12. (1899) I L R 23 M 504 : 10 M L J 253.
13. (1920) I L R 43 M 855 : 39 M L J 567.
14. (1911) I L R 33 A 443.

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tion for necessity is to bind the reversioners, all the co-widows must join in it.

It follows that I cannot agree with the decision in A. S. No. 166 of 1922. In that case the last male owner left a widow Gangalakshmi and two daughters Rattamma and Narasamma. Rattamma effected an alienation of the property along with her sons. The suit was brought by four plaintiffs—plaintiffs 1 to 3 being parties to the alienation, but the 4th plaintiff was not a party to it. Their Lordships found that there was necessity and held that the alienation was binding on the reversioners. So far as plaintiffs 1 to 3 were concerned, the decision might well have rested on the ground that they were parties to the alienation and could not question it. [*Fateh Singh* v. *Thakur Rukmini Ramanji Maharaj* (15) and *Basappa* v. *Fakirappa* (16)]. But as to the 4th plaintiff, we are constrained to differ from the judgment and to dissent from its reasoning. The decisions in *Sri Gajapathi Radhamani* v. *Maharani Pusapati Alakajeswari* (2), *Ramakkal* v. *Ramaswami Naicken* (10) and *Durga Dat* v. *Gita* (14) were referred to and then it was observed: "The facts in this case are different from those in the cases quoted. Gangalakshmi gave away or surrendered her life-interest in some property in favour of Rattamma and it is stated that by another deed she surrendered her right to some other property in favour of Narasamma. After that both Narasamma and Rattamma began to deal with their properties as their own." We are not able to see how the surrender of the mother in favour of her daughters and the conduct of the daughters can have any effect on the rights of the reversioners. It was conceded in the judgment that the alienation cannot affect the rights of Narasamma by survivorship; but it was observed that this has nothing to do with the reversioners who do not claim through Narasamma. Here again, I am compelled to dissent with all deference. When the surviving co-widow gets the property by survivorship after the death of the alienating widow, she represents the estate and the reversioner though he cannot be said to claim through her so as to be bound by her acts still claims through her in respect of matters where she represents the estate. But, apart from this, the cases cited by me also show that a single widow has

2. (1892) I L R 16 M 1 (P C).
10. (1899) I L R 22 M 522 : 9 M L J 101.
14. (1911) I L R 33 A 443.
15. (1923) I L R 45 A 339 (F B).
16. (1921) I L R 46 B 292.

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no power of alienation except for her own convenience, *i. e.*, so as to affect the other widows (except in the partition of the second kind) or the reversioners. It seems to me that the learned Judges who decided A. S. No. 166 of 1922 did not give due weight, while referring to *Ramakkal* v. *Ramaswami Naicken* (10) to the qualification referred to at page 524, *i. e.*, the words "provided it does not extend beyond her life interest" nor to the words "which will prejudice the right of survivorship of her co-widow or the rights of the reversioners after the death of the survivor of the widows" in *Durga Dat* v. *Gita* (14) which was actually quoted by them. The cases in *Gajapathi Nilamani* v. *Gajapathi Rahamani* (6), *Jejoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (5), *Kailash Chandra Chuckerbutty* v. *Kashi Chandra Chuckerbutty* (9) and *Kanni Ammal* v. *Ammakannu Ammal* (12) were not cited at all. All the authorities show that, strictly there is no separate estate of any kind in any one of the widows, a right of partition for the convenient enjoyment being all that is permitted. This contention of the appellants must therefore be disallowed.

The third point argued by the appellant is that he is entitled to the amount of Rs. 516 which was utilised for discharging the husband's decree-debt. Apart from the difficulty that the documents (Exs. IV-(*a*) and V) show that the debt was discharged by the 1st defendant and not by the 2nd defendant and assuming it is open to us to construe them as if the payment to the creditor was made by the 2nd defendant, we do not think he is entitled to any relief. The decree was not a mortgage decree. If the debt discharged was a charged debt, the plaintiff may be entitled to the relief he claims by subrogation. But when there is no charge and seeing that any right by contribution against the plaintiff's half share can be operative during the lifetime of the 1st defendant and not after the death of the 1st defendant so as to affect plaintiff's right by survivorship, there can be no subrogation (*vide* Sheldon on *Subrogation*, page 4, S. 3). S. 69 of the Contract Act cannot help the 2nd defendant for he was not interested in the payment but his vendor, nor can S. 70, as he did not make the payment for or on behalf of the plaintiff. This con-

5. (1868) 5 M H C R 424 at 452. 6. (1877) I L R 1 M 290 (P C).
9. (1897) I L R 24 C 339.
10. (1899) I L R 22 M 522 : 9 M L J 101.
12. (1899) I L R 23 M 504 : 10 M L J 253.
14. (1911) I L R 33 A 443.

tention must also be negatived. The plaintiff is entitled to mesne profits in respect of 1st defendant's half share only from the death of the 1st defendant. The decree requires no modification as no mesne profits have been awarded for the additional half share.

The fourth point argued by the appellant is that the amendment of the plaint so as to enable the plaintiff to claim the whole of the property including the 1st defendant's share ought not to be allowed. He relies on *Lakshmi Ammal* v. *Alamelu Ammal* (17). If the decision is regarded merely as one on the question of discretion on the particular facts of the case and the stage at which the amendment was asked, we have nothing to say against it. But if it meant to lay down that a cause of action that arose after the filing of the suit ought never to be taken notice of, we are constrained to dissent from it. The events that happened even after the filing of the suit—including those that add to the title of the plaintiff—may be taken notice of has been established by several cases (vide *Ram Ratan Sahu* v. *Mohunt Sahu* (18), *Rai Charan* v. *Biswa Nath* (19), *Sri Rajah Setrucharlu Ramachandra Raju* v. *Maharajah of Jeypore* (20) reversed by the Privy Council on another point, *Subbaraya Chetty* v. *Nachiar Ammal* (21), *Doraiswami Pillai* v. *Chinnia Goundan* (22) and *Pendekkallu Thimmayya* v. *Pendekkallu Siddappa* (23). Specially in partition suits it will be very inconvenient if the general principle of confining the suit to the cause of action in the plaint is rigidly adhered to as can be seen from a simple case where *A* filed a suit against his two brothers for partition and seeks to recover a third share, and during the pendency one of the brothers dies, to say that the plaintiff cannot be awarded half instead of a third and that the decree should be limited to a one-third, he being compelled to file another suit for one-sixth is to be technical with a vengeance [*vide* Jenkins, C. J., in *Rustomji* v. *Sheth Purshotamdas* (24)]. No doubt the discretion ought not to be exercised when there is a change of jurisdiction, when there is a great delay in making the application and may not be exercised if a fresh enquiry on other facts is necessary. But when these features do not exist, in our opinion, the amendment ought, as

17. (1923) 45 M L J 811.
18. (1907) 6 C L J 74.
19. (1914) 20 C L J 107.
20. (1916) M W N 355.
21. (1917) 7 L W 403.
22. (1917) 34 M L J 258.
23. (1923) 75 I C 112 : A I R 1925 M 63.
24. (1901) I L R 25 B 606 at 613.

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a general rule, to be allowed to avoid multiplicity of proceedings. In all such cases, the only question of consequence is one of Court fees, a matter with which the parties are not concerned and the opposite party is not deprived of any defence which is obviously open to him (see also *Pendekkallu Thimmayya* v. *Pendekkallu Siddappa* (23)]. This contention must be disallowed. The appeal fails on the merits. The defendants 2 to 4 say that they are not in possession of properties other than those alienated to them and in respect of which a full decree is not passed against them.

In the Lower Court the decree in respect of all the properties was passed against all the defendants including defendants 2 to 4. The plaintiff is entitled to be put in possession of all the properties but the decree, in respect of the properties other than those alienated to defendants 2 to 4, should not have been passed against the defendants 2, 3 and 4. For this reason the parties will bear their own costs in Second Appeal.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Ramaswami Naidu ... *Appellant** (*Respondent—1st Defendant*)

v.

K. N. S. Subbaraya Tevar and others ... *Respondents* (*Petitioner, assignee decree-holder and Defendants 2 to 4 and Plaintiff*).

Ramaswami Naidu v Subbaraya Tevar.

Civil Procedure Code, O. 34—Applicability—Suit for money in which decree creates a charge if a mortgage suit—O. 23, R. 3—Compromise decree containing reliefs beyond scope of suit—Invalidity of decree on ground of—Conditions—Objection if can be taken in execution of decree.

The fact that in a suit for money a charge has been created by the decree does not convert the suit into a mortgage suit and make the provisions of O. 34 of Civil Procedure Code applicable. There can be no question of a preliminary decree and a final decree in such a case.

A decree passed on a compromise cannot be regarded as *ultra vires* simply because it goes beyond the subject-matter of the suit and contains other conditions. If the terms of the compromise decree which do not relate to the suit

*A A O No. 435 of 1923. 5th January, 1925.

23. (1923) 75 I C 112 : A I R 1925 M 63.

appear either directly or indirectly as considerations on which the settlement of the plaint claim was based, then such terms may be considered as part of the decree executable with it.

Quaere.—Whether the objection that a razinama decree contained reliefs which were beyond the scope of the suit can be a ground for questioning the decree in execution.

Appeal against the orders of the Court of the Subordinate Judge of Tanjore, dated 23rd April, and 7th September, 1923, in E. P. No. 4 of 1923 in O. S. No. 80 of 1918.

S. Muthiah Mudaliar and *A. V. Viswanatha Sastri* for appellant.

C. V. Ananthakrishna Aiyar, K. P. Ramakrishna Aiyar and *K. S. Vasudevan* for respondents.

The Court delivered the following

JUDGMENT :—This Civil Miscellaneous Appeal arises in connection with the execution of a razinama decree passed in O. S. No. 80 of 1918 on the file of the Court of the Subordinate Judge of Tanjore. The appellant is the 1st defendant in the suit. The 1st respondent is the assignee decree-holder and the other respondents are the remaining 3 defendants in O. S. No. 80 of 1918 who are the sons of the 1st defendant and the plaintiff the decree-holder. The compromise decree was assigned by the next friend of the plaintiff decree-holder to the present 1st respondent and he presented E. P. No. 4 of 1923 praying for the recognition of the assignment and for the recovery of the amount of Rs. 58,235-12-0 by the sale of the properties as per terms of the decree. The defendants in the suit opposed the application. The Subordinate Judge passed an order recognising the assignment subject to certain conditions and also allowing the execution of the decree. It is this order that is now appealed against by the 1st defendant-appellant.

In order to understand the contentions put forward on his behalf it is necessary to state the facts relating to the compromise decree in detail. O. S. No. 80 of 1918 on the file of the Court of the Subordinate Judge of Tanjore on which the razinama decree was passed was instituted by the minor plaintiff Kamachia Pillai represented by his adoptive mother for specific performance of contract by the present appellant and his sons, defendants 1 to 4, in pursuance of the agreement, dated 5th December, 1915, or for recovery of the amount of advance together with interest thereto, *i. e.,* for Rs. 25,586-1-10. At that time there were two suits pending on the file of the Court

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of the Subordinate Judge of Tanjore in which the present parties were interested and also there was a decree in existence against the late adoptive father of the minor plaintiff passed by the Trichinopoly Sub-Court. One of these suits, viz., O. S. No. 82 of 1918 was instituted by one Natesa Pillai who had obtained an assignment *benami* of a promissory note alleged to have been executed by the 1st defendant (the present appellant) in the name of one Chockalingam, the father of the adoptive mother and next friend of the minor plaintiff in O. S. No. 80 of 1918. O. S. No. 83 of 1918, the other suit, was instituted by the minor plaintiff in O. S. No. 80 of 1918 for recovery of the amount due under the three *othi* deeds executed for Rs. 35,000 by the defendants in O. S. No. 80 of 1918 and the deceased Varadarajulu Naidu in favour of the adoptive father of the minor plaintiff and for delivery of possession in accordance with the aforesaid *othi* deeds and for recovery of *swamibogam*. The decree against the late adoptive father of the minor plaintiff was passed by the Trichinopoly Subordinate Court in O. S. No. 98 of 1918 on its file. It was passed on promissory notes which had been executed by him. Besides compromising the present suit, namely, O. S. No. 80 of 1918, it was arranged by the razinama that the minor plaintiff should cause the heirs of Natesa Pillai not to prosecute the suit O. S. No. 82 of 1918 and that he should withdraw the suit O. S. No. 83 of 1918. The defendants in consideration of the compromise of these suits agreed to pay to the plaintiff (*a*) Rs. 53,000 in quit of all claims and that out of the sum of Rs. 53,000 they agreed to execute in favour of the minor plaintiff a promissory note for Rs. 3,000 with interest and out of the balance pay Palaniappa Chetty the decree-holder in O. S. No.98 of 1918 mentioned above and thus discharge his claim against the adoptive father of the plaintiff within a specified period. It was stated in the compromise that if the defendants in this suit (O. S. No. 80 of 1918) make any default in paying the said amount within the stipulated period aforesaid, the plaintiff is to proceed against the suit properties and to execute the razinama decree that may be passed in the suit, and to sell the properties and recover the amount with costs of execution. The last paragraph of the compromise contains the provision that the parties in this suit and in Suit No. 83 of 1918 are to bear themselves their respective costs. On these terms O. S. No. 80 of 1918 was adjusted by the razinama and a decree was passed in accordance therewith so far as it related to the suit.

The defendants in O. S. No. 80 of 1918 (the appellant and his sons, respondents 2, 3 and 4) not having complied with their obligation in accordance with the razinama decree to pay up the amount due under the decree in O. S. No. 98 of 1918 it was apprehended by the adoptive mother of the plaintiff that the properties of the minor would be brought to sale in execution of that decree unless some arrangement was made for assigning the razinama decree in O. S. No. 80 of 1918, and discharging the debts due to Palaniappa Chetty in O. S. No. 98 of 1918. For the purpose of safeguarding the interest of the minor an assignment of the razinama decree was therefore made in favour of the present 1st respondent for a consideration of Rs. 55,000. It is not here necessary to go into details of the considerations and the obligations which the assignee decree-holder undertook under the assignment. As already mentioned, E. P. No. 4 of 1923 was filed by the assignee decree-holder for recognising the assignment and for executing the razinama decree.

The learned vakil for the appellant in the course of a lengthy argument has emphasised three points for our consideration : (1) That the razinama decree taken in its entirety is only in the nature of a preliminary decree and is incapable of execution in the absence of a final decree. (2) The razinama was made into a decree of the Court only so far as it relates to O. S. No. 80 of 1918. The terms of the razinama relate to matters not covered by O. S. No. 80 of 1918 and inasmuch as these do not fall strictly within the scope of the suit and as it is not possible to determine how far it relates to the subject-matter of the suit, the whole decree is incapable of execution. As regards the terms comprised in the razinama but not covered strictly by the scope of O. S. No 80 of 1918 no relief can be given unless the decree-holder institutes separate suits upon the agreements contained therein and obtains decrees. (3) The assignment is not *bona fide* and has not been made in the interest of the minor plaintiff.

We will now deal with these points separately : (Point No. 1) It is argued that the decree passed in O. S. No. 80 of 1918 is only in the nature of a preliminary decree and the parties should obtain a final decree before taking out execution. We cannot uphold this argument. The decree in the present case was not passed upon a mortgage. A perusal of the plaint makes it clear that the suit is for specific performance or for damages. Paragraph 21 (*a*) of the plaint containing the

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prayer portion runs as follows : "The plaintiff prays for a decree directing the execution of a usufructuary mortgage, mortgaging the undermentioned lands for Rs. 20,113 *plus* interest as detailed below and subject to the previous usufructuary mortgages as undertaken in the agreement, dated 5th December, 1915, or, in the alternative, directing the defendants to pay the plaintiff the undermentioned amounts with subsequent interest." The utmost that can be said in favour of the appellant is that the suit is one for money in which a charge has been created by the decree. This does not convert the suit into a mortgage suit and make the provisions of O. 34 of the Code of Civil Procedure applicable. There was clearly no mortgage suit pending before the Court and therefore there can be no question of a preliminary decree and a final decree. This argument must be overruled. (Point No. 2) The argument on this point has been pressed upon us with great force by the learned vakil for the appellant. It is based upon the wording of O. 23, R. 3 and in essence is this : The decree is executable, if at all, only so far as it "relates to the suit" and as it is not possible to discriminate between the component parts of the decree and to find out how far it relates to the subject-matter of the suit, the entire decree is unexecutable ; and as regards the matters comprised in the decree which do not strictly come within the scope of the suit relief cannot be given to the plaintiff unless separate suits are instituted in enforcement of agreements. This argument is pressed with special force with reference to O. S. No. 83 of 1918, the withdrawal of which by the plaintiff is referred to as one of the terms of the compromise. The answer to this contention is twofold : (*a*) The provisions of O. 23, R. 3 do not lend any support to the argument and (*b*) the parties treated the various terms of the compromise as essential parts of the decree and as considerations for the compromise and acted upon the decree in that light. Order 23, R. 3 runs as follows : "Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith, so far as it relates to the suit." Reliance is placed on the words "so far as it relates to the suit" for emphasising the argument that the razinama

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decree which the Court has to pass can have reference only to the subject-matter of the suit and can have nothing to do with other matters which do not strictly come within the purview of it. The decisions of this Court which have been brought to our notice by the learned vakil for the respondents show that the language of the section is wide and general and that these terms of the section are not to be understood in the way contended for by the appellant. In *Joti Kuruvetappa* v. *Izari Sirusappa* (1) it was held that " In a suit for money where the plaint prays for a simple money decree, an agreement by which the parties agree that the amount decreed according to the compromise should be a charge on certain properties is 'lawful' and 'relates to the suit' so as to be embodied in the decree." It was argued in that case that the claim of the plaintiff was only for money due under bonds which gave no charge on the defendant's property, and that it was therefore not competent to the Court to give a decree creating a charge even though the defendants agreed to such a charge as one of the terms of the compromise to be embodied in the decree. In dealing with that argument the learned Judges say with reference to S. 375 of the old Code of Civil Procedure, corresponding to O. 23, R. 3: " We see nothing in this language to preclude the Court from embodying in the decree the charge which the parties agreed to as security for the debt. The agreement was 'lawful,' and it 'relates to the suit,' that is, to the matter of the claim in the case. In the claim as made in the plaint there was, it is true, no prayer to have the amount charged on the property, but there is nothing in principle or in the language of the section which we have quoted to restrict the relief to be granted in accordance with a compromise to what is prayed for in the plaint or less. If that were the intention of the legislature it would have found no difficulty in expressing the intention in suitable language. On the contrary, the language used is wide and general, and it is obvious that it would be highly inconvenient if the parties should not be allowed to settle their disputes on such lawful terms as they might agree to without being restricted to such relief as one of the parties had chosen to claim in the plaint." It has been decided in *Sabapathy* v. *Vanmahalinga* (2) that the terms in a razinama decree which formed consideration for the compromise of the suit must be deemed to be part of the decree and can be enforced

1. (1907) I L R 30 M 478 : 16 M L J 354.
2. (1914) I L R 38 M 959 : 26 M L J 331.

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in execution proceedings. In that case their Lordships referred to the decision of the Calcutta High Court reported in *Purna Chandra Sarkar* v. *Nil Madhub Nandi* (3) which held that a decree passed on a compromise cannot be regarded as *ultra vires* simply because it goes beyond the subject-matter of the suit and contains other conditions, and that, if those other conditions are the consideration for the compromise of the subject-matter of the suit, they must be incorporated in the decree. The question for consideration, therefore, is whether these terms which are stated to go beyond the strict purview of the suit were considered by the parties as consideration for the compromise of Suit No. 80 of 1918 in which the razinama was passed. This leads us on to the second answer to this argument. There can be no doubt that the parties to O. S. No. 80 of 1918 considered these terms as considerations for the compromise and acted themselves subsequent to the passing of the decree in that view. It is not the appellant's case that the terms of the compromise decree so far as the plaintiff was concerned were not carried out. As a matter of fact O. S. No. 82 of 1918 was dismissed and O. S. No. 83 withdrawn by the plaintiff ; only, the appellant has not acted up to the terms of the compromise so far as he was concerned and the apprehended trouble arising from such non-compliance was the reason, as already indicated, for the assignment of the decree. The cases relied on by the learned vakil for the appellant do not lend any substantial support to his argument. The decision in *Subba Narayana Aiyar* v. *Maya Thevan* (4) referred to by him really supports the argument advanced on behalf of the respondents. That decision suggests that if the terms of the compromise decree which do not relate to the suit appear either directly or indirectly as considerations on which the settlement of the plaint claim was based, then such terms may be considered as part of the decree executable with it. In *Ariyaputhra Goundan* v. *Eliya Goundan* (5) the present question did not arise for consideration. The question for determination in that case was whether the razinama filed in the suit required registration in respect of the portions in the razinama which were not given effect to in the decree. The learned Judge following *Pirival Anni* v. *Lakshmi Anni* (6) held that the Court by its decree accepted the whole razinama and in consequence of such acceptance passed a decree in accordance

3. (1901) 5 C W N 485. 4. (1915) 2 L W 608.
5. (1917) 33 M L J 615. 6. (1899) I L R 22 M 508 : 9 M L J 147 (P C).

therewith so far as the suit property was concerned and that the whole of the razinama was embodied in the decree of the Court and consequently required no registration, even with respect to immoveable properties not comprised in the decree. The same observation has to be made about the decision in *Hemanta Kumari Debi* v. *Midnapur Zamindari Co.* (7) relied upon by the appellant's learned vakil. In that case also the question for consideration was the necessity for registration for being admissible in evidence of a razinama decree which contains terms which do not come strictly within the purview of the suit which was compromised. In dealing with the question whether the decree can be given in evidence to affect matters not coming within the scope of the suit for want of registration the learned Judges no doubt make the remark that it may be that as a decree it is incapable of being executed outside the bounds of the suit, but that does not prevent it being received in evidence of its contents. The present question was not raised in that case and the opinion was expressed in a very hesitating manner. In this connection we may also draw attention to the decision of this Court reported in *The Manager of Sri Meenakshi Devasthanam, Madura* v. *Abdul Kasim Sahib* (8) which says that the argument that the razinama decree contained reliefs which the plaintiff cannot have obtained in the suit after it had been tried affords no ground for questioning the decree in execution. According to this decision this argument must be taken by way of appeal and not in execution of the decree. We, therefore, hold that the compromise decree in its entirety in this case is executable and that it is not necessary for the plaintiff to institute separate suits as argued by the appellant's vakil. This also meets the argument specially advanced with regard to O. S. No. 83 of 1918.

Point No. 3 : The last argument addressed to us relates to the *bona fides* of the assignment and to the question whether it was made in the interest of the minor plaintiff.

[The learned Judges then discuss the evidence bearing upon the point and conclude :]

On a consideration of the evidence in the case we think that the assignment has been made *bona fide* by the next friend of the minor decree-holder and the interests of the minor are safeguarded by the conditions imposed upon the assignee decree-holder by the Subordinate Judge. His order recognising

7. (1919) I L R 47 C 485 : 37 M L J 525 (P C).
8. (1907) I L R 30 M 421 : 17 M L J 255.

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the assignment subject to the specified conditions and allowing the assignee decree-holder to execute the decree must be upheld, and this Civil Miscellaneous Appeal must be dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

[*Reference under S. 98, Civil Procedure Code, on a difference of opinion between Devadoss and Wallace, JJ.*]

Nawab Shuja-ul-mulk Bahadur ... *Appellant** (*1st respondent—1st defendant*)

v.

Umir-ul-umra Bahadur and others ... *Respondents* (*Petitioners* 1, 2 *and* 4—*Plaintiffs* 1, 2 *and* 4).

Nawab Shuja-ul-mulk Bahadur v. Umir ul-umra Bahadur.

Civil Procedure Code, S. 48—Decree directing money to be recovered from one party—On default money to be recovered from another—If barred 12 years after the date of decree—Unauthorised report of Privy Council decision—If binding on Courts.

Where a decree directs that money be recoverable from a party only on failure to recover the same from another, *held*, by Phillips, J. agreeing with Devadoss, J., the execution of the decree becomes barred against the former after twelve years from the date of the decree. The decision of the Full Bench in *Aiyasamier* v. *Venkatachala Mudali*, I L R 40 M 989 must be deemed to have been overruled by the decision of the Judicial Committee in *Khulna Loan Company* v. *Jnanendra Nath Bose*, 22 C W N 145.

Per Devadoss, J.—The Indian Law Reports Act has no application to a decision of the Privy Council and a Court is at liberty to refer to an unauthorised report of a decision of the Privy Council and if satisfied that it is a correct report, it is bound to follow it.

Appeal against the order of the District Court of Kurnool, dated 20th August, 1923, in E. P. No. 12 of 1922 in O. S. No. 17 of 1901.

L. S. Viraraghava Aiyar for appellant.

K. V. Krishnaswami Aiyar for respondents.

The Court (Devadoss and Wallace, JJ.) made the following order of reference to a third Judge :—

Devadoss, J.

Devadoss, J. :—The main question argued in this appeal is whether the execution of the decree in plaintiffs' favour is barred by reason of S. 48 of

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*A A O No. 413 of 1923. 29th April, 1925.

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Devadoss, J.

the Code of Civil Procedure. The District Judge has held that the execution application is not barred by limitation and the 1st respondent in the Lower Court has preferred this appeal. The decree in O. S. No. 17 of 1901 was passed by the District Court of Kurnool on 30th March, 1904. It was confirmed by the High Court on 17th January, 1907. The defendants in that suit were the trustees of a religious and charitable institution. The defendants were removed from the office of trustees, and the 1st defendant was directed to pay the plaintiff's costs and in case the plaintiff was unable to obtain the costs from the 1st defendant, he was to recover them from the income of the trust property. Attempts were made by the plaintiff to recover the costs from the 1st defendant, and he recovered only a portion and a considerable amount now remains to be recovered. The plaintiff's legal representatives have now applied for execution against the income of the religious and charitable institution, namely, the Darga. The contention of Mr. Viraraghava Aiyar for the appellant is that the decree being more than twelve years old is incapable of execution by reason of S. 48 of the Code of Civil Procedure. S. 48, cl. (1) is in these terms :—

"Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from (*a*) the date of the decree sought to be executed, or (*b*) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the appellant seeks to execute the decree."

The decree in this case being a decree for money, and there being no time fixed after which the plaintiff was to proceed against the Darga property, it is urged, the application after twelve years from the date of the decree is barred under S. 48. The District Judge, following *Aiyasamier* v. *Venkatachala Mudali* (1) and *Narayana Aiyar* v. *Singaravelu Vannian* (2), held, that the remedy against the income of the Darga was available to the plaintiff only after he exhausted his remedies against the 1st defendant, and therefore the plaintiff had 12 years' time from 1915 when he failed to get the amount from the 1st defendant.

Under the Civil Procedure Code of 1882, S. 230, "a decree for payment of money became barred after 12 years

1. (1916) I L R 40 M 989 : 31 M L J 515 (F B).
2. (1917) 33 M L J 545.

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from (*a*) the date of the decree sought to be enforced or of the decree on appeal affirming the same, or (*b*) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date —the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree." Under the old Civil Procedure Code attempts were made to get over the 12 years' period by showing that the decree was not a decree merely for money. In *Vaidhinadasamy Aiyar* v. *Somasundaram Pillai* (3) it was held that "a decree directing the sale of mortgaged properties in default of payment of money is a decree for money, whether there is a direction to pay personally or not and whether the remedy against the property is exhausted or not. Such decrees will be money decrees under Ss. 230, 258 and 295 of the Civil Procedure Code although they will not be so under Ss. 220 and 222 of the Code." Under the present Code there is no distinction made between a decree for money and any other decree. S. 48 is clear in its terms, and no distinction therefore could be made between a decree for money and any other decree. The section provides for decrees whereby money is made payable on or after a certain date or money is payable by instalments and for cases of recurring liability as in the case of decrees for maintenance, etc. The question, therefore, is whether a decree which does not come within one of the exceptions to the 12 years' rule in S. 48 can be executed after the expiry of 12 years from the date on which it was passed or affirmed by the Appellate Court. The argument advanced for the respondent and which has found favour with the Lower Court is that the decree against the income of the Darga was unexecutable till the remedy against the 1st defendant was exhausted. The terms of the decree are against such a construction. All that the decree says is "in case of failure to recover the costs from the 1st defendant, the same shall be recovered from the income of the trust property." Can it be said in this case that the plaintiff has 12 years from the date of the decree for pursuing his remedy against the 1st defendant, and, on failure to realize the amount from him, he could proceed against the income of the Darga for another 12 years? Where the decree does not specifically mention the period after which the decree becomes executable against a particular individual or institution, the decree is deemed executable from

3. (1905) I L R 28 M 473 : 15 M L J 126 (F B).

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the date on which it is passed: supposing a decree directs the principal debtor to pay the decree amount and that on the failure of the plaintiff to recover it from the principal debtor, he should be entitled to proceed against the surety, it cannot be said that the creditor has 12 years' limitation against the principal debtor and another 12 years against the surety. The decision in *Aiyasamier* v. *Venkatachala Mudali* (1), which was followed in *Narayana Aiyar* v. *Singaravelu Vanniar* (2), no doubt supports the contention of the plaintiff to some extent. In *Aiyasamier* v. *Venkatachala Mudali* (1) a Full Bench held that "where a mortgage decree provides for recovery of any balance from the other properties of the mortgagor in case the sale-proceeds of the mortgaged properties are found insufficient to satisfy the entire decree amount, the decree-holder has, under S. 48 of the Civil Procedure Code, twelve years for the recovery of such balance reckoned from the time when it is ascertained to be due. Abdur Rahim, Officiating Chief Justice, observed at page 997:—

"When the reliefs given in respect of those rights are distinct and enforceable at different periods of time, then, for purposes of execution, there is, in fact, more than one decree, though embodied in one document. In such cases, it is only reasonable to hold that the date of the decree sought to be executed within the meaning of S. 48, cl. (a) of the Code of Civil Procedure, may not be what it bears on its face. It is the date when the particular adjudication sought to be enforced becomes ripe for execution according to the terms of the decree."

This observation is as regards a mortgage decree whereby the other properties of the mortgagor could be proceeded against only after exhausting the remedy against the mortgaged properties. In the present case who is to determine whether all the remedies against the 1st defendant have been exhausted? The decree simply says that in case of failure to recover the costs from the 1st defendant, the same be recovered from the income of the trust property. It is not a condition precedent in this decree that all the remedies against the 1st defendant should be exhausted before the income of the property could be proceeded against. This case on the facts is distinguishable from the decision in *Aiyasamier* v. *Venkatachala Mudali* (1). But the authority of the Full Bench decision in *Aiyasamier* v. *Venkatachala Mudali* (1) has been considerably shaken by the decision of the Privy Council in *Khulna Loan Company* v. *Jnanendra Nath Bose* (4).

1. (1916) I L R 40 M 989 : 31 M L J 513 (F B).
2. (1917) 33 M L J 543.
4. (1917) 22 C W N 145 (P C).

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There the same point as was under consideration in *Aiyasamier* v. *Venkatachala Mudali* (1) was the subject of decision. The Calcutta High Court disallowed the contention that the decree should be read as directing the payment of money at a certain date, that is, after the mortgaged properties had been sold. The learned Judges observed :—

> "The terms of S. 48 seems to us to be perfectly clear, and according to that section time runs from the date of the decree. The date of the decree is fixed by O. 20, R. 6, and we cannot understand how there can be any other date of the decree from which limitation should run. It has been suggested that this case may be regarded as one in which the decree directed the payment of money to be made at a certain date, namely, after the mortgaged property had been sold. It appears to us that a direction of such a kind would, certainly, not be a direction to pay money at a certain date. The date would not be certain."

On appeal to the Privy Council, the judgment of the Calcutta High Court was affirmed. In the course of the argument the learned counsel for the appellant urged the very same argument that was put forward in *Aiyasamier* v. *Venkatachala Mudali* (1). He submitted it was not an effective decree as it could not be enforced until all the mortgaged properties had been sold, and time therefore did not begin to run against the appellant from the date of the decree. The law required that two decrees ought to be made : "The appellants are entitled to 12 years from each decree, that is, from the decree for sale as well as the decree under S. 90." Lord Dunedin, in delivering the judgment of their Lordships, simply stated : "Their Lordships did not see any reason to differ from the judgment of the High Court in this case." It is suggested for the respondents that this decision has not been reported in the Indian Law Reports and therefore it is not binding on us. The Indian Law Reports Act (Act XVIII of 1875) S. 3 is in these terms :—

> "No Court shall be bound to hear cited, or shall receive or treat as an authority binding on it, the report of any case decided by any of the said High Courts on or after the said day, other than a report, published under the authority of the Governor-General in Council."

This Act has no application to a decision of the Privy Council, and, therefore, we are at liberty to refer to an unauthorised report of the decision of the Privy Council and, if we are satisfied that it is a correct report, we are bound to follow it. The point was specifically raised before the Privy Council, and their Lordships overruled the contention of the appellant. This

1. (1916) I L R 40 M 989 : 31 M L J 513 (F B).

decision of the Privy Council was followed in *Baranashi Koer* v. *Bhabadeb Chatterjee* (5). In *Rameshwar Singh* v. *Homeshwar Singh* (6) there was no executable decree against Ekradeshvar on the date it was passed. As observed by their Lordships :—

"The decree against Ekradeshvar could not have been executed without a further application. This application could not have been made till Ekradeshvar had come into possession of the property of Janeshvar, and by Art. 181 in the schedule to the Limitation Act, the period of limitation for making an application is three years from the time when the right to apply accrues."

In the present case no fresh decree need be passed against the Darga as the decree of 1904 enables the plaintiff to proceed against its income on his failure to recover the decree amount from the 1st defendant.

It is contended by Mr. K. V. Krishnaswami Aiyar for the respondents that there was no executable decree against the income of the Darga till the remedy against the 1st defendant was exhausted. He contends that the Privy Council case even, if it be an authority, cannot apply to the present case, as the mortgagor was only one person against whom the decree was passed, though the mortgaged property was to be proceeded against in the first instance and afterwards his other properties were to be proceeded against. I do not think the Privy Council decision can be explained away on this basis. Whether the decree is against one person or more than one person, unless a time is fixed for proceeding against any particular person, limitation under S. 48 would begin to run from the date of the decree and not from any other date.

It is also contended that time should be calculated only from the date of the decree which is sought to be executed, namely, the decree against the Darga, in other words that the decree consists of two decrees, one against the 1st defendant and the other against the Darga. Whether the remedy is against one or more persons is immaterial so long as no time is fixed for the execution of the decree against the particular individual. The mere fact that, in the first instance, the 1st defendant should be proceeded against and on failure to recover the amount from him the income of the Darga property should be proceeded against is not tantamount to fixing a particular date, after which alone the decree against the Darga could be executed. If such a contention is tenable the question would

5. (1921) 34 C L J 167. 6. (1920) 40 M L J 1 (P C).

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arise : When was the failure to recover the costs from the 1st defendant ? and what amounts to a failure to recover costs from the 1st defendant ? I do not think such a contention is tenable in the absence of a specific date in the decree after which alone it is to be executed against the particular individual or institution.

In *Gopaldas* v. *Tribhowan* (7) it was held that the application for execution of a mortgage decree more than twelve years after the passing of the decree absolute was barred by S. 48 of the Civil Procedure Code. In that case the main argument was that the decree was under the Code of 1882 and that S. 48 did not apply to a decree passed under the old Code. A Bench consisting of the learned Chief Justice and Fawcett, J. held that that contention was untenable. Macleod, C. J., observed at page 376 :—

"It would have been better if the attention of holders of mortgage decrees had been drawn to the alteration made by S. 48 of the Code of 1908, so that they might have been able to realize that no fresh application for execution could be entertained after the expiry of twelve years from the date of their decrees."

In that case the defendants' counsel did not raise the contention that the mortgagee decree-holder had 12 years' limitation from the time the mortgaged property was sold for proceeding against the other properties of the mortgagor.

The case in *Aiyasamier* v. *Venkatachala Mudali* (1) was decided in August, 1916 and the decision of the Privy Council in *Khulna Loan Company* v. *Jnanendra Nath Bose* (4) was on 21st June, 1917. The decision of the Madras High Court does not seem to have been brought to the notice of their Lordships ; but that is no ground for holding that the decision in *Aiyasamier* v. *Venkatachala Mudali* (1) is a proper enunciation of the law on the subject. I therefore hold that the plaintiffs' application for execution is barred under S. 48 of the Civil Procedure Code.

The next contention on behalf of the respondents is that the order was made on 3rd March, 1916, for payment of the amount due in three instalments and the application therefore is in time. Under O. 20, R. 11, the application is to be made to the Court which passed the decree within six months and the order could be made only with the consent of the decree-holder. But the application to pay in instalments was made

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1. (1916) I L R 40 M 989 : 31 M L J 515 (F B).

4. (1917) 22 C W N 145 (P C). 7. (1920) I L R 45 B 365.

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long after the passing of the decree ; and from the order of the District Judge it does not appear that the plaintiffs consented to receive the amount in three instalments. It is not necessary to consider this in detail.

Wallace, J.—I regret that in this case I have not been able to agree with my learned brother.

It is clear that a narrow interpretation of the strict terms of S. 48, Civil Procedure Code, places great difficulties in the application of the section to particular cases. If the decree is not executable except on the happening of certain contingency and that contingency does not happen until after twelve years, is the decree a waste paper ? Or to take an illustration given by Sadasiva Aiyar J., in *Aiyasamier* v *Venkatachala Mudali* (1) when a compromise decree is passed making a certain sum payable to a minor girl on her marriage and she does not marry until after 12 years from the date of decree, is the decree a waste paper ? In the case of such decrees, it is clear that the decree itself implies that there shall be a subsequent order or direction by the Court that the time for executing the decree has arrived and that from that date the decree is executable and time will begin to run. Such an order need not perhaps be explicit although it will be better if it were so ; but it certainly is implicit. The Court in deciding whether such a decree was time-barred, would enquire first, whether 12 years had run from the date when the decree became executable, that is, it would decide as on what date the decree became executable and then begin to compute the 12 years from that date. This is on the well-known principle that a decree which cannot be executed cannot be time-barred. The Courts would stultify themselves if they administered justice on the theory that a party will be barred from a relief because he did not seek it during a period when it was not open to him to seek it.

In order to reconcile this principle with the strict wording of S. 48, Civil Procedure Code, some learned Judges have at times held that the phrase " sought to be executed " in cl. 1 (*a*) indicates that the date has to be ascertained with reference to the time when the decree becomes capable of execution. Other learned Judges have held that the word " certain " in cl. 1 (*d*) means " that which may be rendered certain." I would suggest that the difficulty may be resolved by giving a liberal interpretation to the words " or any subsequent order " in cl. 1 (*b*).

1. (1916) I L R 40 M 989 at 994 : 31 M L J 513 (F B).

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Clearly such subsequent order must be one contemplated by the decree. But if the decree requires such subsequent order to be made before the date on which the money is to be paid or the property is to be delivered becomes certain, and if that date is not certain without such order, then limitation will begin to run from the date of such order. The order becomes in a sense a decree within a decree. It would be passed naturally by the Court which passed the decree acting as such and not by the Court executing the decree [see *Jurawan Pasi* v. *Mahabir Dhar Dube* (8)]. Such an order, as instanced in that case, would be an order under O. 20, R. 11, Civil Procedure Code. But I can see no reason why the phrase should be confined to such orders. In the case of a decree on the face of it not immediately executable, there ought to be a subsequent order declaring it to be now executable.

If the decree directs payment on a certain contingency happening, there ought to be a subsequent order declaring that that contingency has happened. If the decree is not executable against a certain person until and unless a certain contingency happens, there ought to be a subsequent order declaring that that contingency has happened and fixing the date of its occurrence. Such subsequent order will direct the payment of money or delivery of property to be made at a certain date, and cl. 1 (*b*) will then apply in terms.

The decree now before us declared that the trust was only liable if and when the 1st defendant failed to satisfy the decree personally and to the extent to which he so failed. This implies that, before the trust can be made liable, there must be a further order of the Court, implicit if not explicit, that the 1st defendant has failed by some particular date to satisfy the decree, and laying down to what extent he has failed. Only then has the right to execute the decree against the trust accrued, and only then, on the general principle laid down above, does the decree become executable against the trust and limitation begins to run against the decree-holder in respect of that relief. This principle is clearly not affected by the fact that the decree was immediately executable in some other form or against some other person. When the decree-holder has been prevented by the decree itself from seeking his remedy in the form in which, or against the person against whom, he now wishes to seek it, then the decree itself implies that there must

8. (1918) I L R 40 A 198.

be a subsequent order removing this bar to execution in the desired form, before the decree-holder can have the right to execute it in that form or against that person. The decree-holder, when he comes to execute against the trust is in substance, although perhaps not in form, asking for an order that his remedy against the trust has opened, and it is the duty of the Court to consider whether it has so opened, that is, whether there is a failure of the first party to satisfy the decree, before it allows the decree-holder to pursue his remedy against the trust.

It is clear also, I hold, that in the case of a decree like the one now before us, it must be the Court and no one else who is to be the Judge when the second remedy provided for in the decree has opened, that is, in this case, when the failure of the first party to satisfy the decree occurred. It cannot be the decree-holder because it would be always open to the second party against whom execution was sought to contend that the decree-holder had not exhausted his remedies against the principal party or that the principal party was colluding with the decree-holder against him and therefore it was impossible to say that there had been as yet any failure to satisfy the decree, and an executing Court would certainly not permit the decree-holder to execute against the second party until he has satisfied the Court that the principal party has failed to satisfy the decree, and that there is no further reasonable hope of his being able to satisfy it. Therefore it must be left to the Court to decide between these conflicting views. That is only to say that the subsequent order of the Court which the decree implies must be a judicial order. The Court will further enquire whether the decree-holder has been diligent in coming forward to enforce his remedy against the second party, diligent both in enforcing his remedy against the first party and diligent in coming forward to obtain an order, implicit or explicit, that his remedy against the second party has now opened. Unless the decree-holder at once diligently executes his decree against the principal party, his remedy against the second will not accrue, and the ordinary 12 years' rule will apply. But if owing to circumstances not under his control, some obstruction to execution which he has to surmount, he is unable, say for some years, to pursue to the end his remedy against the principal party, so that his diligence and *bona fide* pursuit of his remedy against the principal party occupies, say, 12 years from the date of the decree, then, unless the view I indicate

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prevails, he is deprived of the very remedy against the second party which he obtained by his decree.

I would hold therefore that in a case like the present the decree-holder's remedy against the second party accrued not on the date of the decree but on the date of the failure of the first party to satisfy the decree, which date must be fixed by an order of Court, and that limitation begins to run in respect of that remedy from the date of that order. Such order would, in my view, have the effect of a fresh decree directing the payment of money by the second party to be made from the date of its order, and S. 48 would apply to it as such ; that is, 12 years' limitation for the relief against the second party will run from the date of such an order.

An analogous case would be that of a mortgage decree which provides for recovery of any balance from the other property of the mortgagor in case the sale-proceeds of the mortgaged property are insufficient to satisfy the entire decree amount. In such a case a Full Bench of this Court has held that when the reliefs given in respect of rights under a decree are distinct and enforceable at different periods of time, then for purposes of execution there is in fact more than one decree although embodied in one document, and that the decree-holder has, under S. 48, 12 years from the time when such balance is ascertained to be due, thus implying a subsequent order of the Court declaring on what date that sum was ascertained to be due. It must be admitted that the authority of this decision has been shaken by a later Privy Council case reported in *Khulna Loan Company* v. *Jnanendra Nath Bose* (4), a case reported with disconcerting brevity but it would appear that the Subordinate Judge in that case dated the 12 years from an order under S. 90 of the Transfer of Property Act. This was an appeal from the Calcutta High Court which had followed the view that if the decree originally provided for realization of the balance from the other property of the judgment-debtor, an order under S. 90 of the Transfer of Property Act was not necessary. [See *Lalla Tirhini Sahai* v. *Lalla Hurruck Narain* (9)], and in any case was an order in execution and not an order in the suit. It may be that the High Court in that case held that the *terminus a quo* of S. 48 could not be an order *in execution*, and therefore held the application for execution barred, and that their Lordships of the Privy Council who give no reasons for their judgment followed that line of

4. (1917) 22 C W N 145 (P C). 9. (1895) I L R 21 C 26.

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reasoning. I do not think that report is full enough for us to conclude that that ruling has reversed the principle of our Full Bench ruling. It may be noted that another Privy Council ruling in *Rameshwar Singh* v. *Homeshwar Singh* (6) holds with reference to an interpretation of Art. 182 of the Limitation Act that in the case of a decree not executable except on the happening of a particular contingency, time will not begin to run until that contingency occurs. If the ruling in *Khulna Loan Company* v. *Jnanendra Nath Bose* (4) really means that in all cases of decrees, whether immediately executable or not, the decree is to run from its date, that will conflict with the principle of this ruling, since in that case the decree may become time-barred before it ever becomes capable of being executed. The case in *Narayan* v. *Timmayya* (10) a case of a decree against a principal and a surety does not assist. The decision there turned on the question whether where the decree-holder might proceed either against the principal or against the surety, execution proceedings against the former will avail to save the bar of time against the latter. *Narhar Raghunath* v. *Krishnaji Govind* (11) is somewhat analogous to the present case as the personal remedy against the judgment-debtor only came into force on the happening of a certain contingency and the Court held that limitation began to run from the happening of that contingency. The decision in *Maharaja of Benares* v. *Lalji Singh* (12) does not seem to me to assist and I do not think it necessary to dwell on other cases cited before us.

My general conclusion then is that what is essentially required before limitation begins to run in a case of this kind is an order of the Court stating that the decree-holder's right to execute against the second party has either accrued from a fixed date from which time will begin to run against him in the matter of that supplemental execution or that it has not accrued at all. In the present case there is no such order and I think it is essential that there should be such an order. The Lower Court has not adopted the proper principle in deciding that the right accrued in 1915. It fixes that date merely because the decree-holder chose then to abandon his remedy against the 1st defendant, and to seek his remedy against the trust, that is, it has allowed the decree-holder himself to decide when his right to proceed against the trust began. I am clear

4. (1917) 22 C W N 143 (P C). 6. (1920) 40 M L J 1 (P C).
10. (1906) I L R 31 B 50. 11. (1912) I L R 36 B 368.
12. (1912) I L R 34 A 636.

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that that is not the proper way in which the case should be decided. I would hold therefore that the Lower Court's order is not correct and that the case will have to go back to the Lower Court being the Court which passed the decree for a fresh decision on the principles laid down above (1) as to whether the plaintiff's right to execute the decree against the trust has accrued, (2) if so, on what date it accrued, and (3) whether calculating limitation from that date the decree is, or is not, time-barred.

By Court.—In view of the difference of opinion for a disposal of the appeal, we think that the preliminary point should be referred to another Judge under S. 98, Civil Procedure Code.

"Where a decree directs that money be recoverable from a party only on failure to recover from another party, does the execution of the decree become barred against the former after 12 years from the date of the decree ?"

This appeal again came on for hearing before Phillips, J.

L. S. Viraraghava Aiyar for appellant.

N. Swaminatha Aiyar for *K. V. Krishnaswami Aiyar* for respondents.

The Court delivered the following

Phillips, J.

OPINION :—The question "Where a decree directs that money be recoverable from a party only on failure to recover from another party, does the execution of the decree become barred against the former after 12 years from the date of the decree ?" has been referred to me under S. 98 of the Code of Civil Procedure owing to a difference of opinion between two learned Judges of this Court. The material portion of the decree in this case is,

"that 1st defendant do pay to plaintiff his costs of the suit, Rs. 1,129 ; that in case of failure to recover these costs from 1st defendant the same be recovered from the income of the trust property."

The question put in the above form has not been definitely answered in any reported decisions, but a very similar question is the subject of conflicting decisions. That similar question is whether when there is a decree directing sale of mortgaged property and, in default of the decree amount being realized, directing payment by the mortgagor, the decree is capable of execution more than 12 years after its date. It was held by a Full Bench of this Court by a majority of the Judges that

the 12 years for enforcing the personal remedy against the mortgagor will run from the date of the sale of the mortgaged property—*Aiyasamier* v. *Venkatachala Mudali* (1). The same point was considered by the Calcutta High Court and it was held that the 12 years ran from the date of the decree—*Jnanendra Nath Bose* v. *Khulna Loan Company, Ltd.* (13). The Calcutta case went up to the Privy Council on appeal and the decision of the High Court was affirmed—*Khulna Loan Company, Limited* v. *Jnanendra Nath Bose* (4). In the present case the two referring Judges do not appear to agree as to whether the decision of the Privy Council has the effect of overruling the Full Bench ruling of this Court, Devadoss, J. holding that it does do so and Wallace, J. concluding that it does not do so. The reason given by Wallace, J. is that the report is not full enough to enable him to decide that the principle of the Madras Full Bench ruling has been reversed, but I must observe that, although the judgment of the Privy Council is very brief, it states that their Lordships do not see any reason to differ from the judgment of the High Court. As they use the word "judgment" and not "decree" I think it is clear that they adopt the reasoning contained in the judgment of the Calcutta High Court, and consequently we must accept the principle there laid down. The decision is based on the terms of S. 48 of the Code of Civil Procedure, and on the fact that the date of the decree being fixed by O. 20, R. 7, there can be no other date for the decree. This was one of the main points relied upon by me in my dissenting judgment in *Aiyasamier* v. *Venkatachala Mudali*(1), where I held that a decree can only bear one date and that therefore under S. 48, 12 years must be calculated from that date. It is argued that the decision of the Privy Council on this point is considerably affected by a later judgment *Rameshwar Singh* v. *Homeshwar Singh* (6) where it was held that in the case of a decree not executable, except on the happening of a particular contingency, time will not begin to run until that contingency occurs. This decision has reference to Art. 182 of the Limitation Act and not to S. 48 of the Code of Civil Procedure, but I think it can be distinguished on another ground, namely, that it deals with a decree which was wholly unexecutable on the date it was passed. In the present case, and in the case of mortgage decrees, the decree is undoubtedly executable, at least in part,

1. (1916) I L R 40 M 989 : 31 M L J 515 (F B).
4. (1917) 22 C W N 145 (P C). 6. (1920) 40 M L J 1 (P C).
13. (1915) 18 C W N 492.

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on the date of the decree, and consequently so far as that part is concerned, the 12 years under S. 48 must undoubtedly run from the date of the decree itself. If the Legislature had intended that in such a case a further period of limitation should commence from the date when the second portion of the decree became executable, I think it would have said so, for there is a provision in S. 48, cl. 1 (*b*) that where a decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making payments or delivery in respect of which the applicant seeks to execute the decree is to be the date from which the 12 years is to run. Therefore in a mortgage decree and other decrees like the present it may well be open to the Court to pass a subsequent order declaring that the second portion of the decree had become executable, and directing execution to proceed, and such an order would come within the meaning of the subsequent order referred to in S. 48, cl. (1) (*b*). In the present case, the decree directs payment of the costs by the 1st defendant and that in case of failure to recover these costs from the 1st defendant, the same be recovered from the income of the trust property. It would, therefore, have been open to the plaintiff to ask the Court for a declaration that the costs could not be recovered from the 1st defendant and for an order directing payment out of the trust property, in which case undoubtedly a further period of limitation would begin under S. 48, cl. (1) (*b*). It is pointed out with some force by Devadoss, J. in his order of reference that it cannot be said that under the decree the plaintiff has 12 years to pursue his remedy against the 1st defendant and a further 12 years against the trust property. S. 48 provides an unqualified prohibition of the execution of the decree after 12 years from its date, unless certain specified circumstances exist, and consequently I do not think that it is open to Courts to extend that period, which after all is a very long period, unless the provisions of S. 48 are strictly complied with.

The other cases cited for and against the proposition do not materially further the determination of the question before me. In *Ramana* v. *Babu* (14) it was held that, in executing a decree which had left the question of mesne profits to be determined in execution, an application to determine the profits made after 12 years from the date of the decree was barred under

14. (1912) I L R 37 M 186 : 24 M L J 96.

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S. 48. In *Venkata Perumal* v. *Prayag Dossjee* (15) a Bench of this Court followed the Calcutta ruling in *Jnanendra Nath Bose* v. *Khulna Loan Company, Limited* (13) in preference to the ruling in *Narhar Raghunath* v. *Krishnaji Govind* (11). The case in Bombay was not one of mortgage decree, but was determined on the principle that the 12 years period under S. 48 runs only from the date when the decree became in all its parts ripe for execution. This was the view taken by the majority of the Full Bench in *Aiyasamier* v. *Venkatachala Mudali* (1). As I have pointed out above, this is not in accordance with the judgment of the Privy Council and appears to contemplate the proposition that a decree can bear two separate dates, the first date being the date of the decree on which it can be partially executed, and the second date being the date on which the right to apply for execution of the latter portion falls due. This latter principle is not at all supported by the ruling in *Khulna Loan Company, Limited* v. *Jnanendra Nath Bose* (4).

In view of all these circumstances I must answer the question referred to me in the affirmative.

T. S. V. *Reference answered in the affirmative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Vayyaprath Kunnath Packi ... *Appellant** (*1st plaintiff*)

v.

Vayyaprath Kunnath Muhammad and others ... *Respondents* (*Defendants* 1, 3 *to* 9, 11 *to* 38, 40 *to* 52, 54 *to* 59 *and* 61 *to* 80).

Kunnath Packi v. Kunnath Muhammad.

Malabar Law—Tarwad—Suit on behalf of—Right to bring—Junior member—Right of, when karnavan in existence who can sue.

Except under very special circumstances a junior member of a Malabar tarwad cannot sue on behalf of the tarwad when there is a karnavan in existence who can bring the suit.

The suit was by a junior member of a Malabar tarwad to set aside an alienation made by a former karnavan. The karnavan who made the alienation was dead, and was succeeded by another who also died. The 1st defendant became the karnavan very shortly before the date of suit which was instituted nine months before the claim would have become barred. There was no allegation even in the plaint that plaintiff had consulted the 1st defendant before bringing the suit or that the 1st defendant had been neglecting the

*S A No. 1167 of 1922. 2nd April, 1925.

1. (1916) I L R 40 M 989 : 31 M L J 513 (F B).
4. (1917) 22 C W N 145 (P C).
11. (1912) I L R 36 B 368.
13. (1913) 18 C W N 492.
15. (1915) 29 I C 556.

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interests of the tarwad. There was also nothing to show that the plaintiff believed that the 1st defendant would not have taken action if approached in the matter.

Held, affirming the Court below, that the plaintiff was not entitled to bring such a suit.

Second Appeal against the decree of the Court of the Subordinate Judge of Tellicherry in Appeal No. 216 of 1921 (A. S. No. 602 of 1920, District Court of North Malabar) preferred against the decree of the Court of the District Munsif of Tellicherry in O. S. No. 692 of 1918.

K. P. M. Menon and *K. P. Abdulla Kutty* for appellant.

P. Govinda Menon for respondents.

The Court delivered the following

JUDGMENT :—The main question for determination in this appeal is whether a junior member of a Malabar tarwad can sue on behalf of the tarwad, even when there is a karnavan in existence, who can bring the suit. The powers of a karnavan have been considered on many occasions and it has always been held that he is the controlling authority of the tarwad and that all the powers of management are vested in him. In fact, over sixty years ago, it was held by Mr. Holloway, with regard to a karnavan : "A Malabar family speaks through its head, the karnavan, and in Courts of Justice except in antagonism to that head can speak in no other way." That principle has been upheld in *Vasudevan* v. *Sankaran* (1) and what is practically the same principle has been laid down later in *Soopi* v. *Mariyoma* (2) adopting a decision in S. A. No. 959 of 1917 in which it was held that "only under very special circumstances could the anandravan of the tarwad maintain a suit for redemption of a *kanom* granted by their karnavan, as such a suit would amount to an act of interference in the karnavan's management of tarwad affairs". In *Cheria Pangi Achan* v. *Unnal Achan* (3) it was held by Sadasiva Aiyar, J. that "unless the karnavan himself is disabled from suing to recover possession of or obtain other relief regarding the tarwad property an anandravan cannot be allowed to sue on behalf of the tarwad for the relief claimable by the tarwad in respect of the tarwad property." We find the same principle in *Rajah of Arakal* v. *Churia Kunhi Kannan* (4). Acting on this principle the Lower Courts have held that the appellant has no right of suit and accordingly dismissed it. There

1. (1897) I L R 20 M 129 : 7 M L J 102 (F B).
2. (1919) I L R 43 M 393 : 38 M L J 207.
3. (1916) 32 M L J 323.
4. (1915) 29 M L J 632.

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is one authority which would appear to support the appellant and that is *Anantan* v. *Sankaran* (5). It is a very brief judgment and does not discuss the principle at all. The material portion of the judgment runs as follows :—

"The karnavan is included as a defendant in the suit and as he has failed to sue till the period of 12 years has almost expired, we are of opinion that the suit by the junior members cannot be validly objected to."

If this be taken as a broad proposition of law that in all circumstances the junior member will be entitled to sue when the karnavan has failed to do so, it seems to be opposed to all the prior and subsequent decisions which deny such a right of suit to anandravan unless there are special circumstances which justify his bringing such a suit. But if we look to the facts of that case we find that the two members of the tarwad whose actions were impeached were defendants and all the other members of the tarwad were plaintiffs. Applying the facts to the judgment, the case does come within the principle mentioned above that an anandravan may be permitted to sue when the karnavan had disabled himself from bringing such a suit. In this case the karnavan had, through his agent, another member of the tarwad, made an alienation which was sought to be set aside. It would have been difficult for him to have brought the suit to set aside his own transactions and in that view this case is perfectly consistent with the other cases that I have mentioned above and I think that the decision must be read in the light of these facts. There appears to be no other authority opposed to the cases I have cited.

On the facts of the present case the appellant has nothing particular in his favour. The karnavan who made the alienation is dead. He was succeeded by another and he is also dead, and very recently the 1st defendant has become the karnavan. In the plaint it is not alleged that plaintiff consulted the 1st defendant or that the 1st defendant was neglecting the interests of the tarwad. In fact, no allegation of misconduct is made against him. It is only here in second appeal that it is said for the first time that the 1st defendant was acting in collusion with the alienee. The suit was brought by the plaintiff nine months before the claim would have become barred and inasmuch as the 1st defendant had only recently assumed office, there is nothing to show that the plaintiff believed that he would not take action if approached in the matter. I think it would be very undesirable to extend the

5. (1890) I L R 14 M 101.

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right of an anandravan to bring a suit on behalf of the tarwad for it would lead to multiplicity of litigation and there would be no finality whatever. The case cited have laid down the restrictions which should be imposed on such suits and I entirely agree. In that view the plaintiff has not disclosed any cause of action, that is to say, he is not entitled to bring such a suit and the decree of the Lower Court is right.

It is unnecessary to consider the other point on which the plaintiff's suit has been dismissed, namely, that of limitation. The second appeal must be dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

The Madura, etc., Devasthanam through its Receiver Muthu K. R. V. Alagappa Chettiar ... *Appellant** (*1st defendant*)

v.

Sundaram Annavi and others ... *Respondents* (*Plaintiffs 1 to 6 and 2nd and 3rd defendants*)

Madura, etc., Devasthanam v. Sundaram Annavi.

Civil Procedure Code of 1908, O. 1, R. 1—Parties and causes of action—Misjoinder—Temple servants—Suit by, to set aside order of dismissal by temple trustee—If and when bad for misjoinder—Reversal of decree on ground of misjoinder—Misconduct of temple servant entailing dismissal—What amounts to—Validity of dismissal—Question as to, in suit to set aside order of dismissal—Matter for Court's consideration—Dismissal of servant for his father's offences—Legality of—Prior offences committed by some servant—Consideration of, in determining punishment to be awarded for subsequent offence—Propriety of—Finding of Lower Appellate Court as to validity of order of dismissal—If and when one of fact.

The plaintiffs were holders of a piper service in a temple and instituted the suit out of which the appeal arose for setting aside an order of dismissal passed by the trustee of the temple. The 1st plaintiff had 1|4th share in the inam, the 2nd plaintiff had 1|4th share, plaintiffs 3 to 6 had 1|4th share and the 3rd defendant had 1|4th share. The charges of misconduct against the several plaintiffs were not identical, and in the case of plaintiffs 3 to 6 the dismissal was based on acts committed by their deceased father.

Held, that the suit was bad for misjoinder of parties and causes of action; but that the decree in the suit could not be reversed in appeal on the ground of such misjoinder.

Held further, that in such a suit what the Court has to determine is whether there was justification for the order of dismissal and not whether it would itself have dismissed for such conduct.

Held also, that the Sub-Judge was wrong in holding as a matter of principle that in determining the nature of the punishment to be awarded for a subse-

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*S A No. 749 of 1922. 1st April, 1925.

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quent offence the trustee was not entitled to consider prior offences committed by the servant in question.

No doubt when an offence has been condoned or dealt with and the offender retained in service, it is not open to the employer to subsequently dismiss him for that same offence, but if the servant offends again it is perfectly justifiable for the employer to consider the prior offences in determining in what manner he should be dealt with for the subsequent offence.

Persistent neglect of service, insubordination, and disobedience of orders of the employer repeated from time to time are offences justifying the dismissal of a servant.

The dismissal of a temple servant for offences committed by his deceased father and not by himself is invalid.

Where in a case in which the question was whether the order of a temple trustee dismissing a temple servant was valid, the Sub-Judge held, reversing the decree of the Munsif, that the order of dismissal was invalid, and it appeared that in so holding he did not proceed on the right principles, *held,* that the High Court was not precluded in second appeal from reversing the decision of the Sub-Judge on the ground that it was based on a finding of fact.

Second Appeal against the decree of the Court of the 2nd Additional Subordinate Judge of Madura in A. S. No. 6 of 1921 preferred against the decree of the Court of the District Munsif of Melur at Madura in O. S. No. 117 of 1914.

C. V. Anantakrishna Aiyar and *P. S. Narayanaswami Aiyar* for appellant.

K. V. Krishnaswami Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The plaintiffs are holders of a piper service in a temple and have brought this suit for setting aside the order of dismissal passed by the 1st defendant. The 1st plaintiff has one-fourth share in the inam, the 2nd plaintiff has one-fourth share, plaintiffs 3 to 6 have one-fourth share and the 3rd defendant has one-fourth share. Objection was taken to the framing of the suit on the ground of misjoinder of parties and causes of action. This should undoubtedly have been upheld because the charges of misconduct against the several plaintiffs are not identical and each plaintiff's case ought to have been dealt with on its own merits, and it might well have been found that in so far as some of the plaintiffs are concerned the order of dismissal was unwarranted, whereas in respect of others it was fully justified. That alone is sufficient to constitute misjoinder but there is another fact which shows that there is more than one cause of action. In the case of plaintiffs 3 to 6 the dismissal appears to have been based on acts committed by their father. The father seems to have died while these acts of

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misconduct were being inquired into and the order of the Devasthanam Manager is to the effect that the father who was at that time dead should be dismissed. Subsequently orders of dismissal were sent to his sons, plaintiffs 3 to 6, who consequently had quite a different case to that of the other plaintiffs. However, this case has proceeded and in appeal the decree cannot be reversed on the ground of misjoinder. The First Court found that the dismissal of all the plaintiffs was fully justified. The Appellate Court, after finding that the acts of misconduct found by the First Court were true, has come to the conclusion that the plaintiffs are entitled to a *locus penitentiae* and that the order of dismissal was therefore wrong. It has no doubt been held in *Krishnaswami Tatachari* v. *Gomatum Rangachari* (1) that the question of whether there is or is not sufficient ground for dismissal is one for determination upon the particular circumstances of the case and that when the question is one of degree and not of principle, the finding of the Lower Court must be treated as a finding of fact, conclusive and binding in special appeal. In the present case, however, I do not think that the Subordinate Judge has proceeded on the right principles in coming to his conclusion. He starts by finding that " there has been undesirable neglect of service to an extent which cannot be tolerated in a temple " but nevertheless finds that such conduct does not warrant a dismissal. He has treated the case not with a view to determine whether the facts warranted a dismissal but rather whether he personally would have dismissed them for that conduct. Different employers may have different feelings on a matter of this sort, and where one dismisses a servant, another, more kind-hearted, will give him one more opportunity to correct himself, and a Court has to determine whether there was justification for the order of dismissal and not whether he personally would have dismissed for such conduct. The Subordinate Judge is also wrong in saying that " condoned faults ought not to have a cumulative effect in finally working out a dismissal. " In this case it was found that the plaintiffs had been guilty of misconduct from the year 1904 up till 1912 and these acts of misconduct were repeated on five or six different occasions, the plaintiffs being punished or merely warned for each of these acts. When then, the Subordinate Judge holds as a matter of principle that the punishment to be awarded for a subsequent offence must be awarded without reference to a

1. (1868) 4 M H C R 63.

prior offence is wrong. No doubt when an offence has been condoned or dealt with and the offender retained in service, it is not open to the employer to subsequently dismiss him for that same offence, but if the servant offends again, it is perfectly justifiable for the employer to consider the prior offences in determining in what manner he should be dealt with for the subsequent offence. The Judge is, therefore, clearly wrong in this principle enunciated by him, and that is sufficient ground for my holding that this is not a pure finding of fact which is binding upon me in second appeal. I think it is clear also from a perusal of the learned Judge's judgment that he was really inclined to the view that the dismissal was justifiable, but in view of the severity of the punishment—which means the loss of a large amount of land—he has allowed his kindness to intervene and has declared that the period of nine years which elapsed between the date of dismissal and the date of judgment should be treated as suspension and that the dismissal should be set aside. Not only has he done this, but he has ordered the plaintiffs to pay the costs of the 1st defendant who dismissed them, although he has given a decree in plaintiffs' favour. All these facts, together with the recital in the judgment, clearly show that the learned Subordinate Judge did not mean to hold that the 1st defendant was not justified in dismissing the plaintiffs.

The District Munsif has found that the order of dismissal was justified and on the facts found it cannot be suggested that it was wrong. There was persistent neglect of service, insubordination, and disobedience of orders repeated from time to time. It would be impossible to say that a servant who was guilty of these offences is not worthy of dismissal. The decree of the Subordinate Judge must therefore be set aside. I am asked to remand the appeal for a fresh finding but I do not think that it is necessary in the present case as the facts have all been found and I can come to a conclusion myself.

There is one point in respect of which the plaintiffs 3 to 6 are entitled to consideration. The order of dismissal so far as they are concerned was clearly not justified. In the first place it does not appear that they had actually been appointed and in the second place the order of dismissal was passed for acts committed not by them, but by their father. In this suit it is somewhat difficult to split up the causes of action contained in the plaint, but in the circumstances I think that the decree of the First Court should be confirmed with the modi-

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fication that there will be a declaration that the dismissal of the plaintiffs 3 to 6 is invalid.

Plaintiffs 1 and 2 will pay the costs of the 1st defendant throughout, and plaintiffs 3 to 6 will bear their own costs throughout as in the case of a suit framed as this is it would be unfair to ask the 1st defendant to pay costs in respect of a cause of action not specifically pressed when they have not succeeded in their main contentions.

The memorandum of objections not being pressed is dismissed with costs.

A. S. V. *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

Bava C. Vaithilinga Mudaliar ... *Appellant** (*Petitioner-1st Defendant*)

v.

Chidambaram Pillai ... *Respondent* (*Respondent-Plaintiff*).

Vaithilinga Mudaliar v. Chidambaram Pillai.

Execution of decree—Ulturai kattalai—*Decree against income and assets of*—Mohini *allowance*—*Attachment of, in execution*—*Liability for*—*Trustees of* Ulturai kattalai—*Right of, to object to attachment*—*Executing Court*—*Discretion of, to restrain decree-holder from attaching allowance and to direct him to proceed against other properties*—*Executing Court*—*Jurisdiction of, to question correctness or legality of decree.*

The question was whether *Mohini* allowance could be attached in execution of a decree entitling the plaintiff to recover the decree amount from the *income* and *assets* of the *Ulturai kattalai.* The debt in respect of which the decree was passed was incurred by the Receiver who fully represented the kattalai and the trustees of the kattalai equally represented it in the suit in which the decree was passed. There was nothing to show that the debt in respect of which the decree was passed was not incurred for a purpose which would be a legitimate charge on the *Mohini* allowance. On the other hand it appeared that the debt was incurred for carrying out the objects of the kattalai and performing all kinds of duties in connection with them, and there was nothing to show that the amount borrowed was expended in connection with any particular object.

Held, that the allowance in question constituted a portion of the income of the *Ulturai kattalai,* that it was not open to the trustees to contend that a particular item of income or assets of the kattalai would be excluded from liability for the decree, and that the allowance could be attached in execution of it.

Quaere.—Whether the Court executing the decree has a discretion to restrain the plaintiff from attaching the said allowance and to direct him to proceed against the other properties of the kattalai.

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*A A O No. 71 of 1925. 10th March, 1925.

Vaithilinga Mudaliar v. Chidambaram Pillai.

The Court executing a decree must take the decree as it stands and has no power to go behind the decree or entertain an objection to the legality or correctness of the decree.

Appeal against the order of the Court of the Subordinate Judge of Tiruvalur in E. A. No. 52 of 1925 in E. P. No. 8 of 1925 in O. S. No. 21 of 1923.

K. Bhashyam Aiyangar and *S. Panchapagesa Sastri* for appellant.

C. A. Seshagiri Sastri for *K. S. Jayarama Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—The first defendant-appellant objects to execution on two grounds : first, that the *Mohini* allowance which is sought to be attached is an endowment for a special purpose, and therefore it cannot be made available to a creditor who has obtained a decree against the *Ulturai kattalai* in general terms ; secondly, that the allowance does not constitute either the assets or the income of the *Ulturai kattalai.*

The first objection assumes that the *Mohini* allowance is a part of the assets of the *Ulturai kattalai ;* but the argument is that the kattalai provides for various objects, and that the *Mohini* allowance is earmarked for a certain specific purpose. Granting but not deciding that this is so, it has not been shown that the debt in respect of which the decree was passed was not incurred for a purpose which would be a legitimate charge on the *Mohini* allowance. On the other hand, from the judgment it would appear that the debt was incurred for carrying out the objects of the kattalai and performing all kinds of duties in connection with them, and there is no trace anywhere that the amount borrowed was expended in connection with any particular object. Next the debt was incurred by the Receiver who fully represented the kattalai and the 1st and 2nd defendants being the trustees of the kattalai equally represented it in the suit in which the decree in question was passed. The decree contained clear words that the plaintiff was to recover the amount from the *income* and *assets* of the *Ulturai kattalai.* The executing Court cannot go behind the decree and it will not be open to the defendant to say that a particular item of income or assets should be excluded. [See *Zamindar of Ettiyapuram* v. *Chidambaram Chetty and others* (1)]. Sir John Wallis who delivered the judgment of the Full Bench thus observes :—

1. (1920) I L R 43 M 675 at 686-7 : 39 M L J 75 (F B).

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"This is the view taken in *Hari Govind* v. *Narsingrao Konherrao Deshpande* (2) and *Kalipada Sarkar* v. *Hari Mohan Dalal* (3) is also a recent authority for the proposition that the Court executing the decree cannot go behind it."

This was followed in *Sami Mudaliar* v. *Muthiah Chetty* (4). In *Kalipada Sarkar* v. *Hari Mohan Dalal* (3) the learned Judges said :—

"It is indisputable that the Court executing a decree must take the decree as it stands and has no power to go behind the decree or entertain an objection to the legality or correctness of the decree."

It is noteworthy that no such defence was put forward in the suit although a similar plea was taken in connection with a particular sum which seems to form a part of the kattalai. The learned vakil for the appellant tells us that apart from the *Mohini* allowance of Rs. 7,200 per year, there are two other sums which constitute the endowment—Rs. 1,000 the sum in respect of which exception was taken in the suit itself, and a sum of about Rs. 700 which represents the realisation from the sale of *Prasadams*. If the contention is correct, the only amount that is available to the decree-holder is the latter sum of Rs. 700.

We shall next deal with the second objection. We cannot follow the argument that the *Mohini* allowance is neither the income nor the assets of the kattalai. The very documents on which the appellant relies show that this contention is utterly devoid of force. Ex. B refers to the *Mohini* allowance as cash income. Ex. C includes *Mohini* allowance among the items belonging to the kattalai in question. Again the case which the learned vakil for the appellant has relied on, *Vythilinga Pandara Sannadhi* v. *Somasundara Mudaliar* (5) refers to the *Mohini* allowance as constituting the largest portion of the income of the *Ulturai kattalai*. This argument therefore cannot be accepted.

The appellant lastly contends that we should in our discretion restrain the plaintiff from attaching this allowance and direct him to proceed against the other properties of the kattalai. It is unnecessary to decide whether we have this power ; granting we have it, no reason has been given why we should exercise it in favour of the appellant. The only other items available according to him are the two paltry sums of Rs. 1,000 and Rs. 700. We also must note that this contention was not put forward before the Lower Court. There

2. (1913) I L R 38 B 194.
3. (1916) I L R 44 C 627.
4. (1922) 43 M L J 293.
5. (1893) I L R 17 M 199.

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is no equity on his side, as the judgment, which at present we must assume is right, makes it clear that the debt is a longstanding one and the plaintiff has been kept out of his money for several years ; on the other hand, the defendant (appellant) has not shown that the interests of the trust will be advanced by allowing execution against the other properties.

Finally, the appellant's learned vakil has contended that if the whole *Mohini* allowance is attached, the daily *puja* in the temple cannot be performed and may have to be discontinued. Mr. Seshagiri Sastri, the learned vakil for the respondent, without admitting the truth of this statement, agrees to leave out Rs. 1,200 and attach the balance only, viz., Rs. 6,000. Any sums already drawn by the appellant out of the *Mohini* allowance must go towards the said sum of Rs. 1,200.

The appeal fails and is dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Ramaswami Chettiar ... *Petitioner** (*1st petitioner—4th plaintiff*)

v.

Venkatarama Aiyar and others ... *Respondents* (*Respondents 1 to 4 and petitioners 2 and 3—Plaintiffs 1 to 3, defendant and plaintiffs 5 and 6*).

Ramaswami Chettiar v. Venkatarama Aiyar.

Arbitration—Arbitrators—Power to sell—Power to make rules for the conduct of the sale—Power to act outside rules so made—Power to decide whether or not those rules had been complied with—If and when included—Award beyond jurisdiction of arbitrators—Procedure in case of—Sch. II, para. 14, Civil Procedure Code—Decree in accordance with award in such case—Revision against—Maintainability—Case of mere misconduct of arbitrators—Distinction—Misconduct of arbitrators—Action beyond jurisdiction—Distinction—Award invalid at the time it was made—Admissions subsequent if admissible to validate.

A power to sell conferred upon arbitrators by a reference to arbitration would naturally carry with it the power to make rules for the conduct of the sale, and such rules, subscribed to by the bidders, would, in the case of such parties to the reference as subscribed to those rules, extend to the arbitrators authority to sell according to those rules, but would not extend to them any power to act outside those rules, or any power to decide in a case of controversy whether or not those rules had been complied with.

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*C R P Nos. 205 and 216 of 1923. 5th December, 1924.

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If the award of the arbitrators is beyond their jurisdiction and therefore was made without jurisdiction, the decree which embodies it is also made without jurisdiction. The duty of the Court, when an award sent to it is beyond the jurisdiction of the arbitrators, is not to pass a decree in accordance therewith but to remit it back to the arbitrators under the terms of S. 14 of Sch. II of Civil Procedure Code.

Misconduct on the part of the arbitrators must be misconduct in carrying out the terms of the reference and within the scope of it. Anything beyond that is action without jurisdiction whether or not it may amount also to misconduct.

Where in a case in which a decree is passed in accordance with an award, the objections to the award raise merely questions of misconduct of the arbitrators, involving no question of lack of jurisdiction or material irregularity in the exercise of it, the finding of the Court is final and cannot be attacked either by way of appeal or revision. But a party is entitled to be protected by the law against a decision by arbitrators on points not referred to them at all and against a decree of Court based on such a decision, all the more because he has no right of appeal.

The validity of an award must be judged by the facts as they existed at the time when the award was made. Evidence or statements in the nature of admissions made by a party to the reference at the hearing by the Court of the objections to the award and to a decree being passed in accordance with the award are not relevant to validate a decision in the award which was invalid at the time of the award.

Petitions under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsif of Mayavaram, dated 22nd January, 1923, in I. A. No. 284 of 1921 in O. S. No. 505 of 1919.

T. R. Ramachandra Aiyar, V. Sambandam Chetty and *S. Ramaswami Dikshit* for petitioner in *C. R. P. No.* 205 of 1923.

K. Bhashyam Aiyangar for petitioners in *C. R. P. No.* 216 *of* 1923.

S. Venkatachariar, K. V. Krishnaswami Aiyar and *S. Krishnamachariar* for respondents in both.

The Court delivered the following

JUDGMENT :—The two Civil Revision Petitions are presented against the order of the District Munsif of Mayavaram confirming an award in the matters in dispute in O. S. No. 505 of 1919 on his file, dismissing petitioners' objections and granting the respondents a decree in accordance therewith. The petitioners challenge the order on various grounds, the chief contention being that the arbitrators decided two matters beyond the scope of the reference and therefore beyond their jurisdiction and therefore the Lower Court, in accepting their decision on these points and incorporating it in its decree, has

exceeded its jurisdiction. The arbitration was in the matter of the dissolution of partnership between the six plaintiffs in the suit and the defendants, who were jointly working a mill concern. The reference to arbitration, Ex. A, gave the arbitrators authority, *inter alia,* to sell the property, moveable and immoveable, by public auction to the highest bidder, whether he be a partner or a stranger, to collect the sale proceeds and to distribute them among the partners according to the interests they had in the concern. The arbitrators were also to sell book-debts and outstandings but among the partners only. The final amounts due to the various partners were then to be settled and adjusted with reference to any liability incurred by any partner who may have been a successful bidder at any of the sales.

The arbitrators held a public sale of the mill itself and its machinery on 30th May, 1920, and they were knocked down to the fourth plaintiff, one of the petitioners, for Rs. 28,000. One of the conditions of the sale [*see* Exhibit D-1] was that the bidders should deposit Rs. 1,000 as soon as the sale was knocked down. The fourth plaintiff was able to deposit only Rs. 500. Under a further condition, any bidder, who thus made default in paying his deposit, had to run the risk of a re-sale, his own sale being cancelled and he being responsible for any loss arising out of the re-sale. Accordingly, a re-sale was held on the same terms on 19th July, 1920, at which the highest bidder was one M. K. V. Kandasami Pillai for Rs. 20,000. [*See* Exhibit U.] He had deposited Rs. 100 before bidding and before the sale was closed was asked to pay up the balance of Rs. 900 to make up the initial deposit of Rs. 1,000. This was *prima facie* a clear breach of the rules. He went away saying that he had no money. The property was therefore not knocked down to him but was again put up to auction, and this time one Ramasami Reddi bought for Rs. 14,950. The arbitrators in their award have taken Rs. 14,950 as the "sale proceeds" and, in their adjustment, have debited plaintiffs 4 to 6, the present petitioners, with the difference between that figure and Rs. 28,000, the amount for which the property was knocked down to 4th plaintiff at the first sale.

Three points are hereon raised by the petitioners: first, that the arbitrators had no jurisdiction to break their own rules of sale and postpone knocking down the second sale to Kandasami Pillai until he had paid up the full Rs. 1,000 and thus make

petitioners responsible for a deficit of Rs. 28,000—14,950 instead of Rs. 28,000—20,000. Secondly, that the arbitrators had no jurisdiction to adjust this deficit in calculating the amounts due to each partner, and thirdly that, in any case, they had no jurisdiction to debit the shares of plaintiffs 5 and 6 with any portion of this deficit. We are of opinion that all these points are valid. The reference, Exhibit A, empowers the arbitrators to sell and carry over to the general adjustment the sale proceeds. The power to sell would no doubt naturally carry with it the power to make rules for the conduct of the sale, and such rules, embodied in Ex. D and subscribed to by the bidders would, in the case of such parties to the reference as subscribed to these rules, extend to the arbitrators authority to sell according to these rules, but would not extend to them any power to act outside these rules, or—and this is the important point—any power to decide in a case of controversy whether or not these rules had been complied with. Neither the terms of the reference nor the terms of the sale imply any consent by the parties to submit to the decision of the arbitrators on any controversy regarding the arbitrators' own conduct of the sales or re-sales, and such consent cannot be considered to be inherent in a consent to have the sale or re-sale conducted according to rules laid down by the arbitrators. One would require a very definite and specific term in the reference before concluding that the parties to it agreed to be bound, in a matter of the arbitrators' own conduct of the sale, by the arbitrators' own decision. We are clear that the arbitrators, in deciding that there had been no sale to Kandasami Pillai and that therefore the petitioners were liable for the difference between Rs. 28,000 and Rs. 14,950, were acting outside the scope of their reference.

As to the second point, the reference itself contains no provision for adjusting the deficit on a re-sale against a partner. If it is within the scope of the arbitrators' jurisdiction, it can only be so under the rules of sale consented to by the bidders and would only bind the subscribers to it. Now the 6th defendant did not subscribe to Ex. D at all, and so it cannot bind him. The 4th and 5th defendants subscribed to a condition in Ex. D that "for the loss arising from the re-sale we will be responsible," and again that "in case the plaintiff in the said suit buys at the auction, we agree to pay the remaining amount out of the remaining sum that ought to be paid excluding the share

amount that is due for the balance according to the terms of the agreement." But neither of these conditions implies, to our minds, any surrender by the partner-subscribers of the right possessed by them, as much as by stranger-subscribers, to have the opportunity of challenging the arbitrators' conduct in the matter of re-sale and contending that the amount fixed by them as a deficit on the re-sale was not owing at all or was owing only in part. None of the documents concerned with the reference and the sale draws any distinction in this matter of a possible deficit on a re-sale, between the position of the partner and that of the stranger-purchaser, and therefore the arbitrators have no greater power of dealing with such deficit in the case of a partner than they have in the case of a stranger. On this point we have the admission of one of the arbitrators himself, R. W. 3, that "it does not appear from the reference petition that we can award damages but we thought we had such power. The parties did not tell us to award damages against this or that person. We did what we thought proper. If any stranger was the last bidder in the first sale of the mill and he had made default, we would have written in the award that the sale bidder was liable to pay damages and that the parties should file a suit against him to recover that amount." It seems clear from that statement that the arbitrators themselves recognised the true position and that they had exceeded their jurisdiction in thus awarding damages.

As to the third point, namely, debiting the shares of plaintiffs 5 and 6 with a portion of this deficit, their lack of jurisdiction seems to be still more obvious. As the arbitrators cannot enforce in these proceedings the collection of the deficit from the purchaser—the fourth plaintiff—still less can they enforce it against plaintiffs 5 and 6 who were not purchasers at all. The only reason put forward by them is that plaintiffs 4 to 6 held one share in the business among themselves, and that, in objecting to the re-sale, plaintiffs 5 and 6 associated themselves with the fourth plaintiff. (*See* Ex. J.) One of the arbitrators examined as R. W. 6 before the District Munsif on this point said : " None of the parties requested us to collect the damages from Ramaswami Chettiar and his brother and nephew, plaintiffs 4 to 6. We did not question Ramaswami Chettiar and his people why damages should not be allowed against them. There was no enquiry about the matter.' As Ramaswami, Kesava and Govindan (that is, plaintiffs 4 to 6) are members of the same family and as they were doing every-

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thing about the mill together we decreed damages against the last two also. We did not enquire whether they were divided," which amounts merely to saying that the arbitrators believed among themselves that the fourth plaintiff was bidding also for plaintiffs 5 and 6 ; but as to the grounds for their belief their statements are particularly vague. Even if the reference permitted, which we doubt, the arbitrators to make a roving enquiry as to who was the real purchaser in the final sale, it certainly does not authorise them to make such an enquiry as to who was the real purchaser at a sale subsequently cancelled and therefore not a sale at which "sale proceeds" available for distribution by the arbitrators were realised. It is also quite clear that at the time of the sale the arbitrators did not treat plaintiffs 5 and 6 as the purchasers. The property was not knocked down to them nor were their signatures taken as the highest bidders nor did the arbitrators give any notice to plaintiffs 5 and 6 in the terms of the notice, Ex. G, which they sent to the fourth plaintiff. On this point no subsequent evidence or statements in the nature of admissions by the fifth plaintiff in his evidence before the District Munsif can be relevant to validate a decision in the award which was invalid at the time of the award. It is quite clear that at the time of the sale the person accepted by the arbitrators as the purchaser was the fourth plaintiff and the fourth plaintiff alone. We are satisfied, therefore, that, in fastening the damages of the deficit at the re-sale on plaintiffs 5 and 6 also, the arbitrators were clearly exceeding the terms of their reference.

It is not necessary to go into the other points raised on some of which the Lower Court has dilated at great length. It is obvious that, if the arbitrators have decided matters outside the scope of their reference, the Judge was not entitled to include such matters in his decree. It is no part of a Judge's business to decide whether the plaintiff's objection to the arbitrators' conduct in the re-sale and the allocation of the deficit is justified or not by the facts proved in evidence before him. The only point that he has to consider is whether the disposal of such objections was within the scope of the reference or not, and if it was not, then he has nothing himself to do with it at all. The Judge has treated the case far too much as if it was an appeal against the arbitrators' findings. That is not a proper point of view at all. He seems to regard the case, at its worst, as raising merely questions of misconduct of the arbitrators, on which, of course, if there is no question

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of lack of jurisdiction or material irregularity in the exercise of it, his finding is final and cannot be attacked either by way of appeal or revision. [See *Ghulam Khan* v. *Muhammad Hassan* (1), *Kali Charan Sirdar* v. *Sarat Chunder Chowdhry* (2) and *Batcha Sahib* v. *Abdul Gunny* (3)]. But a party is entitled to be protected by the law against a decision by arbitrators on points not referred to therein at all and against a decree of Court based on such a decision, all the more because he has no right of appeal. [See *Merali Visram* v. *Sheriff Dewji* (4)]. The real point at issue here is the question of lack of jurisdiction for the arbitrators. It is in fact contended by the respondents that all that has been urged by the petitioners is mere misconduct on the part of the arbitrators and not want of jurisdiction. The distinction has no doubt to be kept in mind but there is no doubt in our minds in this case about the answer. Misconduct must be misconduct in carrying out the terms of the reference and within the scope of it. Anything beyond that is action without jurisdiction whether or not it may amount also to misconduct. If the arbitrators' award is then beyond their jurisdiction and therefore was made without jurisdiction, then obviously the decree which embodied it is also made without jurisdiction The duty of the Lower Court, when an award sent to it is beyond the jurisdiction of the arbitrators, was not to pass a decree in accordance therewith but to remit it back to the arbitrators under the terms of S. 14 of Sch. II of the Civil Procedure Code.

The order of the Lower Court cannot, therefore, be supported. We must hold that it is without jurisdiction and we must set it aside. No other grounds of attack on the Lower Court's jurisdiction have been urged before us. In the circumstances we set aside the Lower Court's order and direct it to pass an order in accordance with law.

Plaintiffs 4, 5 and 6 will have their costs (one set). Past and future costs of the Lower Court will abide the event.

A. S. V. *Order set aside.*

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1. (1901) I L R 29 C 167 : 12 M L J 77 (P C).
2. (1903) I L R 30 C 397.
3. (1913) I L R 38 M 256 : 25 M L J 507.
4. (1911) I L R 36 B 105.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE KRISHNAN.

P. L. S. A. R. S. Arunachalam Chettiar,
Legal Representative of P. L. S. A.
R. S. Sabapathi Chetty (deceased) ... *Appellant** (*L. R. of the deceased 1st plaintiff*)

v.

Krishna Aiyar (minor) and others ... *Respondents* (*Defendants 2 and 3 and 2nd plaintiff*).

Arunachalam Chettiar v. Krishna Aiyar.

Contract Act, S. 38 (3)—Promisor's duty under—Proof of identity of the thing contracted for to promisee's satisfaction—Promisor under no obligation to offer—S. 38 (2)—Actual physical possession by seller of goods contracted to be sold if necessary—Contract for purchase of goods—Hundi for advances to be paid under contract for purchase moneys—Suit on—Plea of failure of consideration by reason of breach of contract by seller—Maintainability—Negotiable Instruments Act, S. 45—Effect—Suit treated as one for damages for breach of contract.

S. 38, cl. (3) of the Contract Act only requires that the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver. The promisor is under no obligation to prove the identity of the thing offered to the promisee's satisfaction. It is the promisee's duty to take the steps necessary to satisfy himself. The promisor has only to give him an opportunity for it.

Under S. 38 (2) of the Contract Act actual physical possession of the goods contracted for by the seller is not necessary. It is enough if the goods are under his control and he is able and willing to deliver if the price is paid.

The suit out of which the appeal arose was on a Hundi or Bill of Exchange executed by the defendants in favour of the agent of the plaintiffs. The 1st defendant's firm carried on trade, and in the course of that trade, the agent of the firm entered into contracts with the agent of the plaintiffs' firm for the purchase of a number of bales of yarn to be manufactured by the Madura Mills of certain counts at certain stated prices. The suit Hundi amount appeared to have been made up of advances agreed to be paid under the contract towards the purchase moneys at stated rates. Only some bales were actually taken delivery of and paid for by the 1st defendant under the contracts. The plaintiffs asserted that the contracts were broken by the 1st defendant and not by themselves. They claimed the amount due under the Hundi with interest and costs.

The defendants pleaded that the plaintiffs committed breach of contract and were not therefore entitled to claim the Hundi amount, and further that the Hundi, having been passed in part payment of the stipulated price of goods to be sold, and no goods having been sold or offered for sale to 1st defendant, was not enforceable.

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*Appeal No. 64 of 1922 and
C R P No. 117 of 1922. 7th January, 1925.

Held, that the question as to who committed the breach having been raised in the pleadings and having been fully tried out by the Court below and dealt with by it in its judgment, the case must be dealt with as if it had been one for damages for breach of contract.

Per Krishnan, J.—The suit being by the plaintiff, who, as the payee, was a holder standing in immediate relation to the drawer, the 1st defendant, S. 45 of the Negotiable Instruments Act was no bar to a plea by the defendants that the consideration for the Hundi had failed with reference to all the undelivered bales.

Scope and effect of S. 45.

In England it is open to the parties to raise the question as to breach in a suit on a bill by counter-claiming.

Appeal against the decree of the Court of the Additional Subordinate Judge of Madura in O. S. Nos. 13 and 12 of 1920 (O. S. Nos. 11 and 13 of 1919 on the file of the District Court of Madura).

K. V. Krishnaswami Aiyar and *K. Rajah Aiyar* for appellant.

A. Krishnaswami Aiyar and *P. S. Chandrasekhara Aiyar* for respondents.

The Court delivered the following

JUDGMENTS :—*Krishnan, J.* :—This appeal arises from a suit brought by the plaintiffs in the Subordinate Judge's Court at Madura on a Hundi or Bill of Exchange executed by one Pasimuthu Pillai on behalf of the firm of one Kuppuswami Aiyar, now deceased, in Madura, whose agent he was. The Hundi was drawn in favour of one Kolandavelu Pillai, the 2nd plaintiff, as representing the 1st plaintiff's firm on the 23rd of August, 1918, and is for a sum of Rs. 22,066. It was drawn on the 1st defendant's firm in Madras and is marked Ex. A in the case. It was dishonoured when presented to the Madras firm ; notice was given of it to the 1st defendant who was called upon to pay but failed to do so. Hence this suit was brought. Kuppuswami Aiyar died leaving the 2nd and 3rd defendants as his sons and heirs who succeeded to their father's estate and his trade. The 2nd plaintiff has been joined as a plaintiff to avoid any objection as to parties.

Krishnan, J.

The circumstances under which this Hundi was executed are briefly these :—

The 1st defendant's firm carried on trade in Madura in yarn and cotton thread and, in the course of that trade, the agent of the firm, Pasimuthu Pillai, who was looking after the business, entered into seven contracts with Kolandavelu Pillai, the agent of the 1st plaintiff's firm about the middle of August,

Arunachalam Chettiar v. Krishna Aiyar.

Krishnan, J.

1918, for the purchase of 229 bales of yarn to be manufactured by the Madura Mills of certain counts at certain stated prices. Of these contracts we are concerned in the suit only with four of them relating to 153 bales. The contracts were originally made orally, but at the request of the 1st defendant's agent, they were reduced to writing on the 7th of September, 1918. They are called Varthamanam letters Nos. 21, 22, 23 and 24 and are filed in the case as Exs. B, BI, BII and BIII. The terms of the contracts are fully set out in these letters. It appears from them that the suit Hundi amount was made up of advances agreed to be paid under the contract towards the purchase-moneys at the rate of Rs. 150 per bale, for 25 bales under Ex. B, 20 bales under Ex. BI and 10 bales under Ex. BII, and at the rate of Rs. 142 per bale for 98 bales under Ex. BIII, *less* Rs. 100 paid in cash, which is the subject-matter of the suit—O. S. No. 12 of 1920—brought by the 1st defendant against the 1st plaintiff and tried along with this suit. Only two bales were actually taken delivery of and paid for by the 1st defendant under the contracts. Plaintiffs assert in their plaint that the contracts were broken by the 1st defendant and not by themselves. They claim the amount due under the Hundi with interest and costs.

The defendants pleaded that the plaintiffs committed breach of contract and were not therefore entitled to claim the Hundi amount and further that the Hundi, having been passed in part payment of the stipulated price for goods to be manufactured, and no goods having been sold or offered for sale to 1st defendant was not enforceable. In reply to 1st defendant's pleas, plaintiffs contended that the suit being one on a negotiable instrument, a collateral enquiry could not be held in this suit into the question as to who committed the breach of contract, as such an enquiry is barred by S. 45 of the Negotiable Instruments Act, even though as the payee he was a holder standing in immediate relation to the 1st defendant, the drawer. They also contended that if the question of breach could be gone into, the 1st defendant committed the breach, and the damages they are entitled to being more than the Hundi amount, there was no failure of consideration on the Hundi.

The Subordinate Judge overruled the objection under S. 45 and holding that the breach was committed by the plaintiffs dismissed their suit except to the extent of Rs. 284 of the Hundi amount, which had been taken into consideration in paying the price of the two bales delivered, for which he

gave a decree. He also decreed O. S. No. 12 of 1920 for Rs. 100. 1st plaintiff's legal representatives have appealed to us against the decrees in both these cases, the latter by way of a revision petition under S. 25 of Act IX of 1887.

As regards the objection raised by the plaintiffs against the defence under S. 45, I think the Subordinate Judge is right in overruling it. That section is based on the English law on the point which is stated by Chalmers in his book on "Bills of Exchange," 8th Edition, page 115, to be as follows :— "Partial failure of consideration is a defence *pro tanto* against an immediate party when the failure is an ascertained and liquidated amount but not otherwise," that is, when a collateral enquiry becomes necessary for the purpose. Illustration 1 given on the same page explains what a collateral enquiry is. Illustration 2, however, shows that where a bill is drawn for the price of 2 bales and only one is delivered, the defence that consideration has failed to the extent of one half bale is available. That position is supported by the case of *Agra and Masterman's Bank, Ltd.* v. *Leighton* (1). Now in the present case, as I have already stated, the Hundi amount represents the advance price paid for the 153 bales, the advance towards each bale being definite and fixed. The consideration for the Hundi can thus be pleaded to have failed with reference to all the undelivered bales and that is a sum that could be computed without any inquiry. In this view, it will be the plaintiffs that will suffer if their objection is upheld. But it seems to me that the case should not be disposed of in that manner but the question of who committed the breach should be considered without driving the parties to another suit and thereby multiplying litigation. In England it is open now to the parties to raise the question as to breach in a suit on a bill by counter-claiming. In the present case the question as to who committed the breach has been raised in the pleadings each party charging the other with the breach and it has been fully tried out by the Lower Court and dealt with by it in its judgment. In these circumstances it seems to me that we should deal with the case as if it were one for damages for breach of contract. If the breach is on the plaintiffs' part as held by the Lower Court its decree will be right ; if it is on the 1st defendant's part as contended for by the plaintiffs, there is no reason why plaintiffs should not be allowed to recover the

1. L R (1866) 2 Ex 56.

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Krishnan, J.

Hundi amount as damages in this suit. No further amendment of the pleadings seems to be necessary for the purpose.

The question then is who committed the breach in this case. As the contracts referred not to ready goods, but to goods to be manufactured hereafter by the Madura Mills and to be allotted by them to the purchasers from whom plaintiffs' vendors, Ramachar & Brothers were to get them and the plaintiffs themselves were to get them from the latter firm it was naturally arranged that plaintiffs were to give notice in the first instance to the 1st defendant when the bales were issued by the Mills and finally allotted to the plaintiffs by their vendors. The contracts provide that on the day after receiving such notice 1st defendant was to pay the price deducting the advance on them and take delivery. The first two bales of which notice was given by Ex. C-I to the 1st defendant under contract No. 24 were paid for and taken delivery of according to the terms of Ex. B-III. About five days after the 1st defendant was again given notice by Ex. C-IV of a lot of three bales of 22 1|2 counts being ready for delivery. The market seems to have fallen for these goods in the meanwhile. The 1st defendant instead of taking delivery as before, the next day after Ex. C-IV was received, as he was bound to do under his contract, Ex. B-III, raised objections and sent his letter Ex. I and asked whether the Mill had delivered the abovementioned goods at the prices stated in Ex. B-III, the Varthamanam letter, and also said the Mill invoice should be shown to him. The contract, Ex. B-III, does not speak of any Mill price but only of the price at which P. S. Latchmana Aiyar & Sons bought the bales and there is no provision in it to show the Mill invoice. In fact, it is stated to us that the Mill invoice remains with the original purchaser from the Mill and it is not passed on to the subsequent purchasers of smaller lots. Even if the Mill price were mentioned in Ex. B-III it does not seem to be a part of the description of the goods and is not essential for the identification of the goods purchased. The goods are here identified as being 22 1|2 counts of yarn manufactured by the Madura Mills and sold by them to Tholasi Aiyar & Sons and by them through the intermediary sellers to the plaintiffs. On receiving Ex. I, plaintiffs sent Ex. II to say that they were not bound under their contract to answer the questions asked, or to produce the Mill invoice; they offered to show Ramachar's letter of intimation and called upon 1st defendant to pay the price with interest for the period

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of the delay and take delivery at once. About five days after 1st defendant sent another letter Ex. III in which he insisted on being shown the Mill invoice and the bale number and stated that, on default, he would hold the plaintiffs liable in damages. Further correspondence passed between the parties, Exs. D, G, D 1, II, IV and V but they made no difference in the position taken up by the parties. The contents of those letters are set out fully by the Subordinate Judge and need not be repeated here. It was argued that because in the last paragraph of Ex. G the plaintiffs still offered to deliver the bales, they condoned the previous breach, if any, and kept the contracts alive; but this is of no importance as 1st defendant took no advantage of it but treated the contracts as broken even after Ex. G and called back the whole of his advance. (*See* Ex. H.) As the 1st defendant failed to take delivery, plaintiffs failed to take the bale from their vendors and in consequence Ramachar & Brothers gave them notice that they had sold away the goods in public auction and this fact is mentioned in Ex. IV; with that the controversy as regards these three bales came to an end.

In spite of the conduct of the 1st defendant plaintiffs again gave him notice Ex. X of two bales of Madura Mill Yarn No. 24 being ready for delivery, and asked him to pay for them and take delivery. This notice was also under Ex. B-III. The 1st defendant again adopted the same tactics as before and instead of paying and taking delivery wrote the letter Ex. XI in similar terms to Ex. I. The plaintiffs wrote Ex. XII offering to give 1st defendant all facilities to inspect the goods, as well as the "papers, etc.," which they had; but he did nothing except to send a lawyer's notice, Ex. XII, calling for a return of his advance with interest on the footing that the contracts were off.

With that the correspondence ended. The plaintiffs failed to get the 1st defendant to pay and take delivery of the goods or even to inspect them to satisfy himself that the bales were those contracted for, if he really doubted their identity. There is evidence to show that the market was falling and it was not to the 1st defendant's interest to perform the contracts, he was clearly trying to get out of his contracts. It is true, as the Sub-Judge remarks relying on the observation in *Bowes v. Shand* (2) that if the 1st defendant thought he was going

2. (1877) 2 A C 455.

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to be a loser by accepting the goods; there was nothing to prevent him from trying to escape from a losing bargain, if he could do so lawfully. But he can do so only for a legal and proper reason but not on mere subterfuges.

The bales about which plaintiffs gave notice of readiness to deliver are asserted by them to be bales contracted for. They were buying from Ramachar & Brothers and they got notices from that firm which are produced. There seems to be no reason to doubt that the bales about which notices were given were the bales contracted for. An attempt was made by the defendants to prove that there were no bales of the contract description to which the notices, Exs. C-IV and X could apply by calling the Mill clerk, the only witness examined in the case, but the attempt has failed. He admitted by reference to the Mill ledgers that before 25th September, 1918, 2 bales of 24 counts and 15 bales of 22 1|2 counts Madura Mills yarn was delivered to Tholasi Aiyar & Brothers. He mentions different prices for these bales but I do not think that that matters as I have already explained above. The bales of which notice was given by the plaintiffs were evidently part of those bales ; there is nothing to show the contrary.

The learned Subordinate Judge has held that the plaintiffs committed breach of contract because in his opinion the "plaintiffs failed to discharge the obligation cast upon them by S.38 of the Contract Act in regard to the identity of the goods." It is contended that because the plaintiffs did not answer the questions put to them in Exs. I and II and did not produce the Mill invoice or otherwise prove to the 1st defendant's satisfaction the identity of the bales they offered to deliver with the bales contracted for, they committed breach of contract. S. 38, cl. (3) does not, in my opinion, lay such a heavy burden on the seller as is claimed. It only requires that the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver. The promisor is under no obligation to prove the identity of the thing offered to the promisee's satisfaction. It is the promisee's duty to take the steps necessary to satisfy himself. The promisor has only to give him an opportunity for it. In this case, the goods could have been inspected if the 1st defendant had applied to the plaintiffs to enable him to do so, and to see the count and the number of the bales which, according to the Mill clerk, are marked on the outside

of the bale. If he wanted to see the Mill invoice, he could have applied to Tholasi Aiyar through plaintiffs or directly. But the 1st defendant took no steps for these purposes but contented himself with writing letters with a view to raise a defence subsequently. Plaintiffs offered to place all their "goods and papers, etc." in 1st defendant's hands by Ex. XII, but he did not accept the offer. In these circumstances I have come to the conclusion that plaintiffs did all that they were bound to do under their contracts and that there is no default on their part.

It was further argued that the plaintiffs should have reduced the goods to actual physical possession before giving notice and not having done so, the notices were bad. I am unable to accept this argument. The goods were under the control of the plaintiffs and they were able and willing to deliver if the price was paid as they did in the case of the 2 bales which were taken delivery of by the 1st defendant at the beginning.

That is all that S. 38, cl. (2) requires. Actual physical possession of the goods is not necessary. Delivery is often given on delivery orders in the trade.

Having come to the conclusion that the plaintiffs committed no default, I must hold that 1st defendant committed breach by refusing to take delivery and calling back his advance and that he is liable in damages. Ordinarily an enquiry will have to be held to ascertain the amount of damages but as plaintiffs have sued for the Hundi amount and as it is conceded that damages are likely to exceed the amount, I think, we are justified in giving the 1st plaintiff a decree for the Hundi amount. I would reverse the decree of the Lower Court and give 1st plaintiff a decree for Rs. 22,066 with interest at 6 per cent. from the date of the Hundi to the date of payment and costs in both this and the Lower Court against the estate of the 1st defendant, including the shares of his minor sons. O. S. No. 12 of 1920 will be dismissed with costs in this and the Lower Court.

Phillips, J.

Phillips, J. :—I agree with the order proposed. I am satisfied for the reasons given by my learned brother that it was 1st defendant who committed the breach of the contract and therefore plaintiffs are entitled to damages. As plaintiffs only claim the amount of the plaint Hundi, which is less than the amount of damages claimable, it is unnecessary to decide

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the question of whether S. 45 of the Negotiable Instruments Act is applicable to the facts of this case, and therefore, on that point, I reserve my opinion.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Kaman Mada and others ... *Petitioners* (Defendants)*

v.

Malli and another ... *Respondents (Plaintiff and party respondent).*

Kaman Mada v. Malli.

Civil Procedure Code, O. 33, R. 8—Pauper application filed under the old Court Fees Act—Leave granted after the amended Act came into force—Suit decreed with costs—Liability of defendant to pay Court-fee—Basis of—Limitation Act, S. 3—Suit instituted when application for leave is made.

An application for leave to sue *in forma pauperis* was filed on 23rd December, 1921, when the old Court Fees Act was in force ; leave to sue as pauper was granted on 30th June, 1922, by which time the Court Fees Act as amended had come into force. The suit was decreed with costs and the question arose whether the defendants' liability to pay the amount of Court-fee should be calculated on the basis of the old Act or the new one. *Held,* as for purposes of the Limitation Act, S. 3 provides that in the case of a pauper the suit is to be deemed to be instituted when the application for leave to sue as a pauper is filed, the Court-fee also should be levied as on the date of presentation of the application. S. 3 of the Limitation Act should be read along with O. 33, R. 8, Civil Procedure Code.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the decree of the Court of the District Munsif of Kollegal, dated the 5th of March, 1923, in O. S. No. 153 of 1922 in so far as the said decree directs the petitioners to pay to Government Rs. 175 as Court-fee on the plaint.

C. S. Venkatachariar for petitioners.

The Government Pleader for respondents.

The Court delivered the following

JUDGMENT :—The petitioners seek for revision of the decree of the District Munsif, Kollegal, in O. S. No. 153 of 1922 on the following ground :—

The petitioners are defendants and judgment-debtors in a pauper suit. In assessing the costs the Court has ordered them to pay Rs. 175 as Court-fee on the plaint which would be correct if the old Court Fees Act were applicable. But

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*C R P No. 915 of 1923. 15th July, 1925.

Kaman Mada v. Malli.

if on the day the plaint was filed the new Act was applicable, then the fee, chargeable on the value of one year's maintenance, would be considerably less.

The point for determination is, therefore, when was the plaint filed.

The application to sue as a pauper was presented under O. 33, R. 3 on 23rd December, 1921, when the old Act was in force. The applicant was allowed to sue as a pauper under O. 33, R. 7 on 30th June, 1922, when the new Act was in force. The application was then numbered and registered and deemed the plaint in the suit under O. 33, R. 8. The petitioners plead that it would only be so deemed for the purpose of levying the Court fee on the date when it was numbered and registered. The counter-petitioner contends that it must be deemed to have been filed as a plaint from the date of presentation.

It is urged that until the numbering and registering there is no filing as contemplated by S. 6 of the Court Fees Act. I do not think that anything turns on the technicality of the word "file." If for any purposes the application can rank as a plaint from the date of presentation, then it must be regarded as filed from the date. Now the Limitation Act lays down, S. 3, that in the case of a pauper a suit is instituted when his application for leave to sue as pauper is made. That must mean that from the date of his application it is assumed that his plaint is filed ; it cannot mean that limitation ceases to run by operation of an unfiled plaint. The language used by the Judicial Committee in *Stuart Skinner* v. *William Orde* (1) leaves no room for doubt in the matter. On page 250 : "The petition should operate as a plaint without the necessity of filing a new case. The petition is filed and proceedings are taken."

The Limitation Act is in *pari materia* with the Code of Civil Procedure, and the stipulation in S. 3 of the Act must be read along with O. 33, R. 8 of the Code. The application shall be deemed the plaint in the suit from the date when the application is made. That being so it would be anomalous to have a plaint in the suit for which no Court fee was payable till a later date. The Court-fee is payable from the date of the presentation of the application and it is exactly that fee to which the Court must address its mind when it considers the pauper application. It considers the fee on the date of presentation and

1. (1879) I L R 2 A 241 (P C).

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whether the applicant can afford to pay it, not what the fee may be in future if ever it should become payable.

For the above reasons I see no cause to revise the order of the Lower Court.

The petition is dismissed with costs.

T. S. V. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

The Maharajah of Jeypore ... *Petitioner** (*Landholder*)

v.

Sobha Sundar Dalai and another ... *Respondents* (*Depositor and Defaulter.*)

Maharajah of Jeypore v. Sobha Sundar Dalai.

Madras Estates Land Act, S. 111—Application for sale of holding—Order on—If revisable by the High Court—Board of Revenue declining to interfere—Effect of—Who can stop sale—Persons interested—Acceptance of arrears by landholder—Estoppel.

An order passed by a Revenue Divisional Officer on an application put in by a landholder under S. 111 of the Estates Land Act for a sale of the ryot's holding is revisable by the High Court inasmuch as the Revenue Divisional Officer is a Court subordinate to the High Court. *Paramaswami Aiyangar* v. *Alamelu Natchiar Ammal,* I L R 42 M 76 and *Ramaswami Goundan* v. *Kali Goundan,* I L R 42 M 510 followed. But where the Board of Revenue has declined to interfere with the order, and the Revision Petition in the High Court was filed more than two years after the order, the High Court will not interfere unless there has been a gross miscarriage of justice. *Appanna* v. *Latchayya,* I L R 47 M 250 at 259 followed.

A person who is a total stranger cannot by depositing the amount of rent due by the defaulting ryot obtain a stoppage of the sale. He ought to possess an interest which will be affected by the sale. Where, however, the landholder has accepted the arrears from a person, as if it was paid for rent due by the ryot, he cannot afterwards change his mind and question the interest of the person paying it.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act of 1915 praying the High Court to revise the order, dated 23rd October, 1922, of the Agency Divisional Officer, Oriya Agency, Koraput, in E. L. A. No. 1 of 1922.

P. Somasundaram for petitioner.

K. N. Rajagopala Sastri for *B. Satyanarayana* for respondents.

The Court delivered the following

JUDGMENT :—A preliminary objection has been taken that the revision petition does not lie but following *Paramaswami Aiyangar* v. *Alamelu Natchiar Ammal* (1) and *Rama-*

*C R P No. 529 of 1925. 23rd July, 1925.

1. (1918) I L R 42 M 76 : 35 M L J 632.

Maharajah of Jeypore *v.* Sobha Sundar Dalal.

swami Goundan v. *Kali Goundan* (2) I hold it lies. The learned vakil for the respondents says that there is not even a suit which might go to the District Court and therefore the reason of Ayling, J. in *Paramaswami Aiyangar* v. *Alamelu Natchiar Ammal* (1) does not apply. But we have got an application under S. 111 of the Act. A suit to question it might have been filed by the defaulter under S. 112. I think this is enough to make the Revenue Divisional Officer a Court subordinate to the High Court. How far I should interfere is a difficult matter. Coming to the merits, I remember (1) that this Civil Revision Petition has been filed in April, 1925, against an order of October, 1922 ; (2) that the Board of Revenue has declined to interfere and, if possible, I should not create a conflict between an order of this Court and an order of the Board of Revenue unless there will be such a gross miscarriage of justice by my non-interference as to require my passing an order differing from the Board of Revenue. [*Vide* Devadoss, J. in *Appanna* v. *Latchayya* (3)].

It is true that a total stranger may not, by depositing the amount of rent, obtain a stoppage of the sale. He ought to possess an interest which will be affected by the sale. It is doubtful if that is the case here. The respondents alleged that he was a Mokhasadar of the suit land and all the proceedings taken by the petitioner against the tenants were bogus proceedings. If so, his interest cannot be affected by the sale. The only other way on which a sale may be stopped is by the payment of the amount in default by the respondent or by some other person on his behalf. In this case, the petitioner at first accepted the amount. We must take it that he accepted it, as if it was paid for rent due by the ryot. If so, he cannot change his mind about it and question the interest of the person paying it.

It is obvious on the facts of this litigation that the two parties must soon face each other in a regular suit and it is clear that it is more desirable that the matter in dispute between them should be tried in such a suit rather than be enquired in a proceeding of this kind. Having regard to this consideration and to the conditions I have already set forth at the earlier part of the judgment I decline to interfere.

The petition is dismissed with costs.

T. S. V. *Petition dismissed.*

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1. (1918) I L R 42 M 76 : 35 M L J 632.
2. (1918) I L R 42 M 310 : 36 M L J 571.
3. (1925) I L R 47 M 250 at 259 : 45 M L J 725.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

The Krishna Jute and Cotton Mills Co., Ltd., Ellore, represented by Mothey Gangaraju Garu, Secretary and Treasurer ... *Petitioner** (*Plaintiff*)

v.

The Municipal Council, Vizianagram ... *Respondent* (*Deft.*)

Krishna Jute and Cotton Mills Co., Ltd. *v.* Municipal Council, Vizianagram.

Madras District Municipalities Act (V of 1920), Ss. 78, 80, 92 and 354—Levy of profession tax—Payment under protest—Suit for refund—Plea that amount appropriated towards company tax—Provisions of statute not complied with—Duties of public bodies—Power to relieve from statutory obligation—Suit if maintainable.

A Municipality levied from a Company a certain sum of money as profession tax. The money was paid under protest and an appeal was preferred to the Council on the ground that the Company had been exempted from payment of profession tax by a decree of Court. Failing to get any reply, the Company gave the usual notice of suit under the District Municipalities Act and filed a suit for refund of the amount paid. The defence raised was that the money paid had been allotted towards the companies tax payable under the Act and also that the Civil Court had no jurisdiction under S. 354. It was found that none of the statutory requirements for the levy of companies tax had been complied with. *Held,* a Municipal Council cannot impose charges not authorised by law and when a suit is filed for their recovery allot the money unlawfully obtained to some demand alleged to be under the authority of the Municipal Act and plead that no suit lies. The powers conferred on local bodies are on the understanding that they observe the conditions of the statute to which they owe their origin and Courts of Law have no power to relieve them from the statutory obligations imposed upon them. The levy of profession tax and companies tax not being under the authority of the Act, the jurisdiction of the Civil Courts was not ousted by S. 354.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Vizianagram in S. C. S. No. 966 of 1922.

T. Ramachandra Rao for petitioner.

V. Suryanarayana for respondent.

The Court delivered the following

JUDGMENT :—The petitioner seeks to revise the decree of the Court of the District Munsif of Vizianagram in S. C. S. No. 966 of 1922.

The petitioner is the Krishna Jute Cotton Mills Co., Ltd. On 31st March, 1922, it was served with a demand notice by the counter-petitioner, the Municipal Council of Vizianagram, for profession tax from 1st October, 1921 to 31st March, 1922 assessed at Rs. 125. The petitioner paid and preferred the

*C R P No. 872 of 1923. 27th July, 1925.

appeal Ex. A to the Council pointing out that the company had been decreed exempt from profession tax in O. S. No. 521 of 1919.

The petitioner, receiving no reply to this appeal, gave the Council notice of suit, Ex. B, dated 28th August, 1922. No reply was received, and on 7th October, 1922 the petitioner filed the suit under revision. On the next day a Memorandum Ex. D was drafted in the Municipal Office, which was signed on 17th October, 1922, by the Chairman. The petitioner was informed that his appeal against the companies tax had been read, and that the proper assessment should have been Rs. 75 and Rs. 50 would be refunded.

On 6th November, 1922, the Council filed its written statement in the suit. It claims that the suit is barred under S. 354 of Madras Act V of 1920 ; that the plaintiff had not been charged profession tax, but had been assessed under cl. 16 of Sch. IV of Companies Tax and when plaintiff paid he had been given a receipt on the form intended for profession tax. Nevertheless plaintiff was bound to pay profession tax.

At the trial the defendant Council did not, it seems, attempt to prove that the tax had been originally levied as companies tax, and only receipted as profession tax on the wrong form. It was conceded that the tax was levied as profession tax, and the only question raised was whether the Council's retention of Rs. 75 out of the sum illegally levied could be justified on the ground that it had been allotted to companies tax and was therefore imposed under the authority of the Act within the mischief of S. 354, and so irrecoverable by suit.

It is very doubtful if this defence is open to the Council. A Municipal Council cannot impose charges not under the authority of the Act, and then, when a suit is filed for their recovery, allot the money thus unlawfully obtained to some demand alleged to be under the authority of the Act and plead that no suit lies. But in the present suit the plea has no validity for the demand to which the collection has now been allotted is as illegal as that under which it was originally made.

A Council may levy a tax on companies [S. 78 (1) *b*] if it publishes a notice of its intention [S. 78 (3)] and then a notification in the District Gazette [S. 80] and if the Chairman publishes that notification, companies shall be liable to pay the tax [S. 92]. Only on such terms can a Council impose such a charge under the authority of the Act. Admittedly the

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Council published no notification under S. 80 but the learned District Munsif finds that a Council may dispense with that notification. This finding is a misinterpretation of S. 80 which is mandatory and a perusal of S. 92 ought to have made the matter perfectly clear. It is no use finding that the Council has "substantially complied" with the statute. Large powers are conferred upon these local bodies, upon the strict understanding that they observe the conditions of the statute to which they owe their origin, and to allow them to levy taxes upon private persons without such strict compliance would be a grave scandal. At any rate the Courts have no power to relieve local bodies from the statutory obligations imposed upon them.

I find that the levy of profession tax and the levy of companies tax were not made under the authority of the Act. Plaintiff is entitled to sue, and to have a decree for a refund of the money sued for, with costs.

The decree of the Lower Court is reversed and the petition allowed with costs.

T. S. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Ramalinga Aiyar ... *Petitioner** (*Complainant*)

v.

Budde Varadarajulu Aiyar and others ... *Respondents* (*Accused*).

Ramalinga Aiyar v. Varadarajulu Aiyar.

Criminal Procedure Code, S. 345—Charge of defamation—Muchilika signed referring disputes to panchayatdars*—No award passed—If amounts to composition—Duty of Court.*

After a charge for defamation was framed in a case, the parties signed a *muchilika* referring their disputes to *panchayatdars.* No arbitration took place in accordance with it and no award was passed. *Held,* the mere signing of the *muchilika* did not amount to a composition of the offence under S. 345, Criminal Procedure Code, as it was only a primary step towards composition. In order to amount to a composition the arrangement must be one by which the parties have settled their differences and not a mere arrangement to settle the disputes in future as the result of some action either by themselves or by third parties.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order

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*Cr R C No. 639 of 1924
Cr R P No. 556 of 1924. 24th April, 1925.

Ramalinga Aiyar v. Varadarajulu Aiyar.

of the Court of the Sub-divisional First Class Magistrate of Salem in C. C. No. 30 of 1924, dated 30th June, 1924.

N. C. Vijiaraghavachariar for petitioner.

The Public Prosecutor and *Salem Ramaswami Aiyar* for respondents.

The Court made the following

ORDER :—In this case a complaint was filed by one Ramalinga Aiyar, who is the petitioner before me, against a number of accused for defamation and the case was tried by the Sub-divisional Magistrate of Salem. After the charge had been framed in the case against the accused the Magistrate dismissed the complaint on the ground that the offence had been compounded. It is contended before me that the Magistrate was in error in thinking that there was any completed composition of the offence in the case. What happened was that some mediators advising the parties induced them to enter into a *muchilika*. The terms of the agreement are set out by the Magistrate in his order. It says :—"We agree that you, the *panchayatdars*, should inquire into all our disputes, namely, (1) the one in O. S. No. 53 of 1923 on the file of the Second Additional District Munsif, Salem, (2) the one in O. S. No. 211 of 1922 on the file of the Principal District Munsif, Salem, and (3) the one in C. C. No. 30 of 1924 on the file of the Sub-divisional Magistrate, Salem," that is this case. The arbitrators are asked to make inquiries in regard to these cases and pass a decision within 15 days. No doubt this *muchilika* is signed by both the parties. As a matter of fact no arbitration took place in accordance with it and no award has been passed by the arbitrators. But it was argued before the Sub-divisional Magistrate that the very signing of the *muchilika* amounted to a composition of the offence under S. 500, Indian Penal Code, which was being tried by him and that his jurisdiction was ousted and that he was bound to act under S. 345, Criminal Procedure Code, and pass an order of dismissal. It seems to me that the Sub-divisional Magistrate has taken a wrong view of the position altogether in accepting that argument. The *muchilika* was only one step towards the composition of the offence between the parties. It is only if the *muchilika* is carried out and according to its terms an award is arrived at there will be a complete composition in the case. Till that is done the mere agreement or *muchilika* is only, as has been argued before the Lower Court, a preliminary step towards composition and not the composition

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itself. There is nothing whatsoever in the *muchilika* to show that the parties intended that the mere signing of it was to have the effect of compounding the offence. They expected the arbitrators to act and to make an award in 15 days and on that award being made no doubt the criminal case will be treated as compounded but till that is done I cannot see how the case can be treated as compounded at all. As put by Mr. Justice Trevelyan in *Murray* v. *The Queen-Empress* (1) : "The compounding of an offence supposes an arrangement by which the parties have settled their differences and in the more usual acceptation of the term implies that the prosecutor has received some consideration or gratification for dropping the prosecution." At any rate, the arrangement must be one by which the parties have settled their differences and not a mere arrangement to settle the disputes in future as the result of some action either by themselves or by third parties. In this case till action is taken by the arbitrators and some decision arrived at by them, it is not possible to hold that the parties settled their differences. There is no question here of two tribunals carrying on the trial of the same case at the same time. The Magistrate had granted an adjournment for 15 days and he was not going on with the case. If within that time the award had been passed, no doubt there would have been a proper composition of the case but no such award having been passed, the arbitration failed and there was nothing more to be done than for the Magistrate to go on with the case. It must be remembered that criminal cases do not stand on the same footing as civil cases in the matter of settlement. A criminal case is not a matter between parties as a civil case is. It seems to me that a Magistrate is not bound to recognise a reference to arbitration and wait for the arbitrators to make the award though it will be reasonable to do so. If he does not choose to wait he will not be doing anything illegal. But if he chooses to wait and then there is an award, that award may amount to a compounding of the offence in question and if it is an offence compoundable under S. 345 effect will be given to such compounding. But till the actual compounding takes place the Magistrate is not bound at all to stay his hands but may go on with the trial of the case himself. In the present case, as I have said already, there is nothing in the *muchilika* to show that the mere giving of the *muchilika* was to be treated as compounding the offence. In these cir-

1. (1893) I L R 21 C 103.

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cumstances I must set aside the order of the Magistrate and direct him to take the case on to his file and go on with the trial from where he left it off and complete it without further delay.

T. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Devaguptapu Narasimham and others ... *Appellants** (*Plaintiffs*)

v.

Devaguptapu Chendramma and others ... *Respondents* (*Defendants* 1 *to* 6, 8 *and* 10 *to* 12).

Narasimham v. Chendramma.

Inam—Enfranchisement—Title deed issued subsequent to death of grantee —"Inam confirmed to X, his representatives and assigns"—If words of limitation—Board's Standing Orders, O. 52 (2)—Effect of.

An inam was enfranchised and a title deed issued in favour of the holder, containing the following words: "The inam is now confirmed to you, your representatives and assigns, to hold or dispose of as you or they think proper." The holder was dead on the day on which the title deed was issued and the question arose whether his heirs were entitled to the properties. *Held*, the intention of the Government as can be gathered from the procedure laid down in the Board's Standing Orders, O. 52 (2) is not to construe the terms in the inam title deed as mere words of limitation. The heirs of the person in whose name the title deed is issued were therefore entitled to the properties.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Vizagapatam in A. S. No. 112 of 1922 (A. S. No. 309 of 1920 on the file of the District Court and A. S. No. 161 of 1920 of the Sub-Court) preferred against the decree of the Court of the District Munsif of Vizagapatam in O. S. No. 83 of 1918.

C. Rama Rao for appellants.

Y. Suryanarayana for respondents.

The Court delivered the following

JUDGMENT :—The plaintiffs are the nearest heirs of one Venkataraju in whose favour (with others) three inam title deeds were issued in 1906 and 1907. Both the Lower Courts have found that as Venkataraju was dead on the day on which these title deeds were issued he obtained no right to the suit property, and therefore the plaintiffs as his heirs have got no right.

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*S A No. 1574 of 1922. 30th April, 1925.

Narasimham v. Chendramma.

The title deed runs as follows :—

"Title deed granted to (1) Devaguptapu Subbarayudu, (2) Devaguptapu Chendramma, (3) Devaguptapu Venkataraju and four others as per register,"

and it recites :—

"The inam is now confirmed to you, your representatives and assigns, to hold or dispose of as you or they think proper."

The question at issue is whether this is a grant to Venkataraju and his representatives and assigns, or whether these words are words of mere limitation as contended for by the respondent. The treatment of such words as being words of limitation is a legal technicality and the question is, whether the Government in issuing this deed intended to adopt this technicality or whether they intended to use the words in their ordinary meaning. The words are, no doubt, ambiguous. Therefore, I think, it is relevant to refer to the Board's Standing Orders, O. 52 (2) which deals with this question. There it is laid down :—

"In case of the death of the holder of an enfranchised inam before the actual delivery to him of the title deed, the deed should, in the first place, be entrusted to the Revenue Authorities for safe custody. The Collector should make inquiry as to who is the party entitled, as heir of the deceased, to receive the deed, and is enjoined to hand it over, exactly as received, to the heir of the deceased."

If these words were words of mere limitation, the grant to the deceased would fail, and if it was intended to give a fresh grant to the heirs, it would be necessary to issue a grant afresh in their name. Inasmuch as the Government have declared that that is not the procedure to be adopted, I think it is clear that these words are not mere words of limitation but are effective to secure the grant to the heirs of the deceased grantee, which is the intention of Government as expressed in the above Board's Standing Order. That being so, the plaintiffs are entitled to the properties covered by the grant.

A question is raised by the respondent as to the non-joinder of parties, but under O. 1, R. 13, Civil Procedure Code, this should have been raised in the Trial Court and must now be deemed to have been waived.

As the Lower Appellate Court has not recorded any finding on the other issues in this suit, this decree must be set aside and the appeal remanded for disposal on the other issues. Costs will abide the result.

Stamp fee on the appeal memo. will be refunded to the appellant.

T. S. V. *Appeal remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE ODGERS.

Garimella Annapurnayya ... *Appellant** (*Plaintiff*)

v.

Munsunuri Venkatasubramaniam and others ... *Respondents* (*Defts.* 1 *to* 6).

Annapurnayya v. Venkatasubramaniam.

Hindu Law—Adoption—Natural father—Right to act as next friend of his son—Suit to declare gift by adoptive father invalid—Compromise—Effect of—If bars subsequent suit—Failure to plead fraud on registration law—If amounts to negligence.

The plaintiff sued for a declaration that he was an adopted son of a person deceased and that a gift deed made by the latter in favour of his wife was invalid. During the plaintiff's minority, his natural father, acting as his next friend, had sued for the same relief but with the permission of the Court the suit was compromised, the plaintiff being allotted a house and certain lands, while he gave up all his rights to the rest of the properties. In the present suit he alleged that his next friend was guilty of negligence in that he failed to plead the invalidity of the gift deed on account of a fraud on registration law committed by his adoptive father by including in the gift deed for purposes of giving jurisdiction to the Sub-Registrar a small piece of land which did not belong to him. He also alleged that after the adoption, his natural father had no right to act as his next friend in the previous suit or to compromise the suit. *Held,* (1) as at the date of the compromise, *i. e.,* 1908, it was thought to be the law that a registration was not rendered invalid merely because no portion of the property concerned was situate within the jurisdiction of the registering officer, the guardian could not be held negligent in omitting to put forward such a plea or in failing to foresee that the law would soon change; and (2) the natural father was the most suitable person to represent the plaintiff's interest as next friend in a suit to assert his rights against rival claimants.

Appeal against the decree of the Court of the Additional Subordinate Judge of Cocanada in O. S. No. 27 of 1921.

C. Rama Rao for appellant.

P. Somasundaram and *P. Satyanarayana Rao* for respondents.

The Court delivered the following

JUDGMENTS :—*Spencer, J.* :—The plaintiff sued in this case for a declaration that he was the adopted son of the late G. Bhimayya and that the gift made by Bhimayya on 5th June, 1906, in favour of his wife Seethamma was invalid and for recovery of the property from the persons in possession. Spencer, J.

O. S. No. 39 of 1908 on the file of the Subordinate Judge of Cocanada was a suit instituted by the natural father of this plaintiff as his next friend during his minority for the same reliefs as those asked for in the present case. It was compromised by the plaintiffs taking 2 acres and a house

*Appeal No. 420 of 1922. 19th December 1924.

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Spencer, J.

site and surrendering the rest of his claims. The Court gave leave to the next friend of the plaintiff to enter into this compromise upon the certificate of his pleader that the terms were beneficial to the minor. Under that compromise the minor plaintiff gave up his claim to the rest of the properties of the late Bhimayya. The Subordinate Judge has held in the present suit on a preliminary issue that the compromise decree in O. S. No. 39 of 1908 was not vitiated by any fraud, collusion or gross negligence on the part of the plaintiff's next friend (who is 4th defendant in this suit) and therefore the present suit was not maintainable as the plaintiff was not entitled in the absence of fraud, collusion or negligence on the part of his next friend, to get the compromise decree set aside and have a fresh decision upon the same points which were at issue in the former case.

In appeal it is urged that the Subordinate Judge was in error in not deciding the other issues in the suit, especially Issue 7, which was whether the two cents of land in Konkuduru village of Bikkavole Taluq belonged to the donor and were really meant to be conveyed in the gift deed or were nominally inserted in order to give jurisdiction to the Bikkavole Sub-Registrar. The plea of fraud and collusion on the part of the plaintiff's next friend in the prior suit was given up at the trial. It is now urged that the next friend's failure to plead the invalidity of the gift deed on account of the fraud upon the registration law committed by inserting two cents of land in Konkuduru which did not belong to the donor for the purpose of getting the document registered in the Bikkavole Sub-Registrar's Office was an act of gross negligence which vitiated the whole proceedings and made the decree not binding on the minor plaintiff. Secondly, it is urged that the plaintiff's natural father had, in consequence of the adoption, lost his right to represent the minor plaintiff in the former suit and consequently he had no power to compromise the suit on the minor's behalf.

On the first point I feel clear that it is not necessary for the purpose of this case to decide Issue 7.

In order to determine whether the plaintiff's next friend in the former suit was or was not guilty of gross negligence, it is not necessary to decide whether the gift in favour of the plaintiff's adoptive mother was really invalid by being registered in a Registration Office which had no jurisdiction over the properties gifted. The real issue that had to be decided was

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Spencer, J.

whether the plaintiff's next friend acted *bona fide* in consenting to take 2 acres of land and a house site instead of continuing the litigation and attempting to get more by pleading that the gift deed was altogether invalidated by collusion between the donor and the donee in the matter of registration. At the time when the compromise was entered into (3rd September, 1909) the decision of the Privy Council of 1914 in *Harendra Lal Roy* v. *Haridasi Debi* (1) to the effect that a collusive act of including a small portion of land not belonging to the mortgagor in a mortgage deed which was to be registered was a fraud upon the registration law had not then been pronounced. The law as laid down by this Court in *Veerappa Chetty* v. *Kadiresan Chetty* (2), which was decided on 2nd April, 1913, was to the effect that the wrong acceptance of a document for registration in an office of a Sub-Registrar within whose sub-district no portion of the property concerned was situate was not to be regarded as rendering the registration invalid. Earlier decisions of 1879 and 1881 of other High Courts in *Sheo Shunkur Sahoy* v. *Hirdey Narain Sahu* (3) and *Har Sahai* v. *Chunni Kuar* (4) were to the similar effect. The minor's next friend would have been justified in 1908 or 1909 in assuming that what this Court decided afterwards in 1913 was good law on the point of a defect in the registration of documents or at any rate he cannot be accused of negligence in not knowing the law better and in failing to take this point which was not an obvious one and even if he had raised it, the suit might have ended in a compromise on the same terms from considerations of what would be a fair settlement. The plaintiff's next friend therefore cannot be charged with neglect for not putting in the foreground that plea is defeasance of the right of the plaintiff's adoptive mother and if he was not negligent in this respect, the decree is binding on the plaintiff as *res judicata* and the present suit will not lie. It is not now alleged that the plaintiff's next friend was negligent in any other manner.

Again the suit having been brought against the plaintiff's adoptive mother and other defendants who derived a title from her, the adoptive father being already dead, his natural father was the most suitable person to represent his interest as next friend. This principle was established in *Nirvanaya* v. *Nirvanaya* (5), where it was held that the natural father of

1. (1914) I L R 41 C 972 : 27 M L J 80 (P C).
2. (1913) 24 M L J 664.
3. (1879) I L R 6 C 25.
4. (1881) I L R 4 A 14.
5. (1885) I L R 9 B 365.

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a minor was his proper guardian to assert his right as adopted heir against rival claimants and this has been followed in *Venkatappayya* v. *Venkata Ranga Rao* (6). I am of opinion that the Subordinate Judge's finding on the preliminary issue was correct and in this view it was unnecessary to try the other issues. The suit failed and the appeal also must be dismissed with costs.

Odgers, J.

Odgers, J. :—In this case the plaintiff admittedly cannot succeed unless he can show that the compromise decree in O. S. No. 39 of 1908 on the file of the Court of the Subordinate Judge of Cocanada is not binding on him. His case is that he was informally adopted by his uncle Garimella Bhimayya in December, 1901, when he was a few weeks old; it was not till 1907 that a registered adoption deed was executed. Meanwhile in 1906 Garimella Bhimayya made a gift deed of all the properties in favour of his wife. In 1908 by the suit abovementioned the natural father of the plaintiff, the 4th defendant in this case, brought a suit on plaintiff's behalf for the recovery of Garimella Bhimayya's properties after setting aside the deed of gift. This was compromised on 3rd September, 1909, Ex. II (*b*), the adoptive father having died in January, 1908. By the compromise the plaintiff got 2 acres of land and a dwelling-house. In the present suit he alleges that the gift deed was executed by Garimella Bhimayya by fraud and coercion, that the gift deed included 2 cents of lands in Konkuduru village which did not belong to Garimella Bhimayya and which were included in order to give jurisdiction to the Bikkavole Sub-Registry ; further, that the natural father had no right to represent the plaintiff in suit O. S. No. 39 of 1908 and that he was fraudulent and negligent in conducting the suit. This issue as to the binding character of the compromise decree and the representation by the natural father was treated as a preliminary issue by the Subordinate Judge and on his findings against the plaintiff he dismissed the suit. Hence the appeal. Two points are argued before us—that the natural father ceases to be the natural guardian after adoption. This is so, but here he was in my opinion a fit and proper person to represent the plaintiff. The gift by the adoptive father was in question and the adoptive mother was the donee under it. It is quite plain that neither of these persons could properly represent the adopted son. Representation for a plaintiff needs no order of Court. A minor's next friend may be any

6. (1919) I L R 43 M 288 at 303 : 38 M L J 149.

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Odgers, J.

suitable person even a natural father. [*Nirvanaya* v. *Nirvanaya* (5) and *Venkatappayya* v. *Venkata Ranga Rao* (6)].

The important point taken is that the guardian *ad litem* (natural father) of the plaintiff in O. S. No. 39 of 1908 did not take a point in his plaint on which he was certain to succeed and there would therefore have been no need for a compromise. The point in question is as to the 2 cents of land in Konkuduru village. It is said that had that point been taken the gift deed must have been held to be invalid and inoperative. The question was only raised in the present suit after amendment of the plaint, *see* para. 6 (*a*) and even then only with reference to the validity of the deed of gift and not with respect to the neglect of the guardian in O. S. No. 39 of 1908 whose alleged fraud, collusion, etc., are set out in para. 8 of the plaint. This is really enough to dispose of the point, especially as the Subordinate Judge remarks that the alleged fraud and collusion were given up before him. The law is however also against the appellant. The older view was that registration in an office in which no portion of the property is situated did not render the registration invalid [*Veerappa Chetty* v. *Kadiresan Chetty* (2)]. This was the prevailing view in 1908. It is only since it has been altered [*Harendra Lal Roy* v. *Haridasi Debi* (1)] and even then it must be shown that there was collusion between the parties [*Venkata Lakshmikanta Raju Garu* v. *Peda Venkata Jagannatha Raju Garu* (7), and *Biswanath Prasad* v. *Chandra Narayan Chowdhury* (8)].

I do not think a guardian can be charged with gross negligence in that he did not foresee that the law would change. Even if this is to be imputed to him as I have stated the charge is limited to a certain state of facts not proved to exist here. It is a question of fact whether a guardian is justified in entering into a compromise [*Baboo Lekraj Roy* v. *Baboo Mahtab Chand* (9)].

Here we have the permission of the Court which considered the circumstances.

A further point was raised about the house, Sch. B, sold to the natural father by the adoptive mother (Ex. C), it is said at a nominal price and as a bribe to induce him as guardian to enter into the compromise. The price was Rs. 700 the value

1. (1914) I L R 41 C 972 : 27 M L J 80 (P C). 2. (1915) 24 M L J 664.
5. (1885) I L R 9 B 365. 6. (1919) I L R 43 M 288 at 308 : 38 M L J 149.
7. (1923) 46 M L J 12. 8. (1921) I L R 48 C 509 at 516 (P C).
9. (1871) 14 M I A 393.

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put on the house by plaintiff in his present plaint. It was valued at Rs. 400 in the plaint in O. S. No. 39 of 1908 (Ex. B) and in the decree. The value is now really double. The Subordinate Judge finds that the house was purchased for consideration and it could not be rented. There is therefore nothing wrong about that.

The appeal fails and must be dismissed with costs.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

S. Samu Asari ... *Appellant** (*1st defendant*)

v.

Kullappan Asari's wife Anachi Ammal ... *Respondent* (*Plaintiff*).

Samu Asari v. Anachi Ammal.

Provincial Small Cause Courts Act, Sch. II, Art. 28—Intestacy—Suit for the price of jewels left by the deceased—If of a small cause nature—Test of jurisdiction—Defence not to be considered—Marriage among Asaris—Contribution towards marriage expenses by bridegroom's party—Asura form—Custom of taking contribution—Effect of.

A suit for the price of jewels which belonged to the plaintiff's deceased daughter and which the plaintiff claims as her heir in intestacy falls under Sch. II, Art. 28 of the Provincial Small Cause Courts Act and is exempted from the cognizance of a Small Cause Court. *Chhedi* v. *Gulabo*, I L R 27 A 622 and *Kapalee Bewah* v. *Keshram Koech*, (1869) 11 W R 95 dissented from. The question whether a suit lies in the small cause side or on the original side of a Court depends upon a construction of the plaint only and is not affected by the nature of the plea taken in defence.

Where a substantial contribution towards the expenses of a Hindu marriage is made by the party of the bridegroom, it must be regarded as equivalent to paying a bride price and the marriage is one in the *Asura* form. The prevalence of a custom among *Asaris* of taking such contribution does not make the marriage one in the *Brahma* form.

Second Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in A. S. No. 95 of 1921 preferred against the decree of the Court of the Additional District Munsif of Palghat in O. S. No. 401 of 1920 (O. S. No 412 of 1920) on the file of the Court of the Principal District Munsif of Palghat.

C. S. Swaminathan for appellant.

C. Unikanda Menon for respondent.

The Court delivered the following

JUDGMENT :—When the second appeal was taken up I at first felt a doubt whether a second appeal lay, because the

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*S A No. 1730 of 1922. 15th July, 1925.

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suit is to recover Rs. 270, being the price of jewels belonging to plaintiff's deceased daughter which the plaintiff claims as her heir on the ground that the marriage of the deceased was in the Asura form.

The learned vakil for the respondent took up my suggestion and argued the preliminary objection. He relied on *Chhedi* v. *Gulabo* (1) in support of his objection. This decision no doubt seems to support him. It relies on two earlier decisions in *Kapalee Bewah* v. *Keshram Kooch* (2) and in *Moheshur Mondul* v. *Koilash Nath Mandul* (3). I may at once observe that the decision in *Moheshur Mondul* v. *Koilash Nath Mandul* (3) is really irrelevant. For, in that case, the title was established by a prior judgment and the suit was merely for possession of specific moveable property. It is now well established that the question whether a suit lies in the small cause side or on the original jurisdiction depends upon a construction of the plaint only. What the defence of the defendant in his written statement will be or what attitude the defendant assumed with reference to a demand made by the plaintiff prior to suit is really an irrelevant consideration in the determination of this question. Art. 28 of the Second Schedule of the Provincial Small Cause Courts Act runs as follows :—

"(28) A suit for a legacy or for the whole or a share of a residue bequeathed by a testator, or for the whole or a share of the property of an intestate."

In the present case it is conceded by the vakils on both sides that the deceased Ankammal had no other property except these jewels. If there had been any other property in the possession of the defendant, the plaintiff would have sued for it. It is obvious that the plaintiff is suing for the whole of the property of her deceased daughter who died intestate. I fail to see why a suit of that kind does not fall under Art. 28 simply because the defendant does not set up the plea of a rival claimant. I find some difficulty in accepting the test laid down in *Chhedi* v. *Gulabo* (1) and in the case in *Kapalee Bewah* v. *Keshram Kooch* (2) relied on in it. But, in the present case, even according to the test laid down in *Chhedi* v. *Gulabo* (1), it seems to me that the suit lies in the original side because the defendant, in his written statement, contends that Krishnamasari, the husband of the deceased, succeeded to her property

1. (1905) I L R 27 A 622. 2. (1869) 11 W R 93. 3. (1880) 7 C L R 71.

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and that the 2nd defendant succeeded Krishnamasari as his mother. This contention amounts to setting up the plea of a rival claimant. It is true there are other defences also in the written statement, but I do not see how the addition of other defences makes it the less the plea of a rival claimant. For these reasons I think the second appeal lies though I must again add that the second reason (according to which I have to refer to the written statement) is unsatisfactory and I would rather rest my conclusion on a construction of the language of the Article, differing from *Chhedi* v. *Gulabo* (1) and from *Kapalee Bewah* v. *Keshram Kooch* (2). The preliminary objection is, therefore, overruled.

Coming to the merits of the case, the evidence in the case and the findings of the Courts below show that, in the community to which the parties belong, namely the community of goldsmiths or Asaris, it is customary for the bridegroom's party to make a payment to the parents of the bride to enable them to meet a substantial part of the expenses of the marriage. It seems to me immaterial whether it is the whole of the expenses of the marriage or a substantial portion of it. To the extent the bride's father gets a contribution of that kind from the bridegroom's father he benefits by it; though he does not pocket it, he spends for the marriage. It is true that presents made to the bride's parents which are either small or relatively small having regard to the scale on which the rest of the expenses of the marriage are incurred do not necessarily make a marriage an *asura* marriage. One must really look into the substance of the transaction. In the case in *Rev. Gabrielnathaswami* v. *Valliammai Ammal* (4) there was some obscurity as to the meaning of the word *parisu panam*. The learned Judges who originally heard the second appeal had a suspicion that it might be merely a courtesy present given to the bride's parents and so they called for a finding whether it was regarded as a bride price. Having regard to the ruling in *Muthu Aiyar* v. *Chidambara Aiyar* (5) and to the statement in Manu, Ch. III, vv. 25 and 52, Ch. IX, vv. 98 and 100, quoted in Mayne's *Hindu Law*, 9th edn., Art. 81, "Let no father, who knows the law, receive a gratuity however small, for giving his daughter in marriage, since the man who, through avarice, takes a gratuity for that purpose is a seller of his offspring." I think that a substantial contribution towards the expenses of

1. (1905) I L R 27 A 622.
2. (1869) 11 W R 93.
4. (1920) M W N 158.
5. (1893) 3 M L J 261.

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the marriage must be regarded as equivalent to taking a bride price. The learned vakil for the respondent relied on a remark in my judgment in *Ratnathanni* v. *Somasundara Mudaliar* (6). I there said :—" No special custom among Mudaliars to the effect that the bridegroom should incur the expenses of the marriage has been pleaded. " That remark was made to avoid discussion of that question. It is true in this case a custom has been pleaded and proved and I have to decide whether the existence of such a custom makes any difference in the result. I am of opinion it does not. If there is a general custom of taking contribution from the bridegroom's party among Asaris, it only comes to this that every Asari marriage is an *Asura* form of marriage and it is not that on the ground of the general prevalence of such a custom, the marriage should be regarded as one in the *Brahma* form. The decision in *Jaikisondas Gopaldas* v. *Harkisondas Hullochandas and another* (7) has nothing to do with the point before me. There a present called *Palu* was made to the bride and not to the bride's relations. I am of opinion that the form of marriage in the case is not *Brahma* form, but *Asura* form, and, agreeing with the Courts below, I dismiss the second appeal with costs.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Munuswami Nayakar ... *Appellant** (*1st defendant*)

v.

Abdul Azeez Sahib and another ... *Respondents* (*Plaintiffs* 1, 2, 7 *and* 8—*Defendants* 3 *to* 5 *and plaintiffs* 3 *to* 6 *and* 9).

Munuswami Nayakar v. Abdul Azeez Sahib.

Trust—Sale of property by trustee for purchasing other property—Sale set aside by Court—Vendee—Rights of—Charge on substituted property—Costs of bona fide *purchaser.*

Certain properties belonging to a trust were sold by the trustee and with the sale proceeds another property was purchased. Some persons interested in the trust brought a suit for setting aside the sale on the ground that the sale was not binding on the trust and it was set aside. *Held,* the vendee should be given a charge for his purchase money on the property purchased with the sale proceeds and where the sale to him is a fair and *bona fide* one, he is also entitled to his costs in the suit.

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*S A No. 1595 of 1922. 21st April, 1925.

6. (1921) 41 M L J 76. 7. (1876) I L R 2 B 9.

Munuswami Nayakar v. Abdul Azeez Sahib.

Second Appeal against the decree of the Court of the Subordinate Judge of Chingleput in A. S. No. 113 of 1921 (A. S. No. 285 of 1921 on the file of the District Court of Chingleput) preferred against the decree of the Court of the Additional District Munsif of Chingleput in O. S. No. 152 of 1918 (O. S. No. 103 of 1918 on the file of the Court of the District Munsif of Poonamallee remanded by the District Court of Chingleput in A. S. No. 475 of 1919).

C. V. Anantakrishna Aiyar and *C. Pattabhirama Aiyangar* for appellant.

V. Viswanatha Sastri, C. Sankararama Sastri and *T. S. Rajagopala Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—This appeal is by the 1st defendant. He purchased some property belonging to a mosque in St. Thomas Mount from the Mutwali, the 3rd defendant in the suit, for Rs. 1,000. After the purchase some persons interested in the mosque brought the present suit for setting aside the sale on the ground that the sale was not binding on the trust. The District Munsif dismissed the suit but on appeal the Subordinate Judge of Chingleput decreed the suit in plaintiff's favour. Mr. Anantakrishna Aiyar, who appears for the 1st defendant, does not object to the judgment of the Appellate Court so far as it sets aside the sale in favour of the plaintiffs. But his contention is that inasmuch as the trust was benefited by the sale to him, the trust is bound to pay back to him the amount which it received from him by sale of the property. The property was sold to the 1st defendant, and out of the sale proceeds another property was purchased in St. Thomas Mount. The Mutwali and the persons who attended the meeting of the committee which advised him to sell the property evidently thought that the property was not yielding any appreciable income whereas a shop in St. Thomas Mount would be yielding a very fair income. The sale was on 5th October, 1917, under Ex. V, and the purchase of the shop in St. Thomas Mount was under Ex. I on 12th February, 1918. From both the documents it is quite clear that the sale to the 1st defendant was for the purpose of buying property in St. Thomas Mount and the whole of the consideration for the sale to the 1st defendant was utilised for the purpose of buying the shop. That being so, the question is whether the trust, that is, the mosque, should be allowed to get back the property on the

ground that the sale did not bind the trust and should also keep the property which it purchased by utilising the sale proceeds obtained from the defendant. I think in a case like this where it is quite clear that the trust has had the benefit of the sale which is set aside the Court should make the trust pay back what it gained by the sale which is afterwards held not to be binding on the trust. In the case of minors it was held that if the guardian sells property belonging to the minor or borrows money for the purpose of buying property and if afterwards the minor seeks to set aside the transaction the Court would be justified in making the minor pay back what was got by the sale or by borrowing on his account. Vide *Burrayya* v. *Ramayya* (1), *Rabia Bi* v. *Angappan* (2) and *Dijendra* v. *Manorama Dasi* (3). I think the same principle should be made applicable to a trust. It is a well-known principle of equity that if a person seeks equity he ought to do equity. The sale is set aside merely on the ground that the vendor who acted on behalf of the trust could not bind the trust by his act, but where with the proceeds of the sale some other property is purchased it is but proper that when the sale is set aside the vendee should be allowed to proceed for the money paid by him to the trust against the property which was purchased with the consideration given by him for the sale in his favour. This principle was applied by the Calcutta High Court in a case reported in *Badal* v. *Tinkari* (4). In that case a Mutwali granted a lease and received Rs. 400 by way of *selami*. His successor sued to set aside the lease. The Court held that he could do so on his paying back Rs. 400 which was received as *selami* for the lease. In this case the sale was for a definite purpose, namely, for the purchase of a shop and the proceeds were utilised in purchasing the shop. It is but proper that when the sale to the 1st defendant is set aside he should be allowed to proceed not against the general assets of the trust but against the shop which was purchased with the sale proceeds. I therefore modify the decree of the Lower Appellate Court by directing the Mutwali of the mosque to pay to the 1st defendant Rs. 1,000 before he recovers possession of the property sold to the 1st defendant, and this amount will be a charge on the shop which was purchased in St. Thomas Mount. If the Mutwali does not pay the amount the 1st defendant will be entitled to proceed in execution of the decree against

1. (1923) I L R 47 M 449 : 46 M L J 49
2. (1915) 28 I C 714.
3. (1922) 36 C L J 326.
4. (1917) 26 C L J 263.

the shop purchased under Ex. I in St. Thomas Mount. The transaction so far as the defendant is concerned was a fair and *bona fide* one. I think in the circumstances the 1st defendant is entitled to his costs incurred in the three Courts. The direction as regards mesne profits will stand. But the 1st defendant is entitled to get interest at 6 per cent. on the amount from the date of Ex. I to the day on which the money is paid to him. The 1st defendant will have a charge for the total amount of Rs. 1,000, interest and costs in the shop in St. Thomas Mount. The decree of the Lower Appellate Court will be further varied by directing possession to be given not to the 1st plaintiff in the suit but to the 3rd defendant, the Mutwali of the mosque. The plaintiff's costs in the three Courts will come out of the trust funds belonging to the mosque.

T. S. V. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Papakannu Errappa Reddi and others... *Appellants** (*Defendants Nos.* 3 *to* 6)

v.

Mutcheli Peddamuniswami Setti and others ... *Respondents.*

Madras Estates Land Act, S. 131—Default in payment of kist—Sale of holding—Fraud—Suit to set aside sale—Jurisdiction of Civil Court—If barred.

Where a holding is sold for default in payment of kist and a suit is filed in the Civil Court to have the sale set aside on the ground of fraud, S. 131 of the Estates Land Act does not bar the right of suit in the ordinary Civil Courts. *Gouse Moideen Sahib* v. *Muthialu Chettiar*, 26 M L J 36 followed. The decree passed in such a suit will not be binding on persons who are not impleaded therein.

Second Appeal against the decree of the Court of the Subordinate Judge of Chittoor in A. S. No. 373 of 1921 (A. S. No. 317 of 1921 on the file of the District Court of Chittoor) preferred against the decree of the Court of the District Munsif of Madanapalle in O. S. No. 296 of 1920.

A. Ramaswami Aiyar for appellants.

N. Chandrasekhara Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The facts found in this case which, I must accept, are as follows :—The appellants were tenants under

*S A No. 495 of 1923. 13th July, 1925.

Enappa Reddi v. Peddamunisami Setti.

the plaintiffs of the suit lands. During the tenancy they defaulted in the payment of the kist due to the superior landlord and the lands were brought to sale and purchased, some by the 6th defendant himself, and some by the 6th defendant's father-in-law Lakshmana Reddi. Both the Lower Courts have found that these sales were brought about by the fraud of the defendants and have accordingly given a decree for recovery of the lands from the defendants with arrears of rent.

In appeal here it is argued that this suit should have been brought in a Revenue Court inasmuch as it was necessary for the plaintiffs to set aside the revenue sale. Reliance is placed on the ruling in *Ramanathan* v. *Ramaswami* (1). That ruling, however, very clearly and carefully differentiates the case reported in *Gouse Moideen Sahib* v. *Muthialu Chettiar* (2), where it was held that the right to set aside a sale conferred by S. 131 of the Estates Land Act does not take away the right of suit in the ordinary Civil Courts to set aside the sale on the ground of fraud. Here we are concerned with fraud ; consequently, in accordance with the principle laid down in *Gouse Moideen Sahib* v. *Muthialu Chettiar* (2), I hold that it is not necessary to bring this suit in a Revenue Court. If the defendants (appellants) were allowed to take advantage of this sale which they brought about solely to defraud the plaintiffs of their rights, it would be giving them the advantage of their own fraud. That is a course which no Court would deliberately pursue. This objection, therefore, fails.

It is also argued that Lakshmana Reddi should have been made a party to this suit. The plaintiffs did not choose to make him a party and of course the decree will not be binding upon him. He is a very close relation of the defendants. He actually came to Court and produced documents on their behalf, but he did not ask to be impleaded, nor did he give evidence, nor did the defendants ask that he should be impleaded as a party. The 6th defendant merely said that the suit should be dismissed because he was not a party. I agree with the learned Subordinate Judge and the District Munsif that it was not necessary for the plaintiffs to make him a party, provided that the plaintiffs are satisfied with a decree which is judicially not binding upon him. This objection also fails.

In view of the concurrent findings of facts of both the Lower Courts the decree appealed against is right. The second appeal is dismissed with costs.

T. S. V. *Appeal dismissed.*

1. (1914) I L R 39 M 60. 2. (1914) 26 M L J 56.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

A. R. S. M. A. R. L. Arunachalam Chettiar by power of attorney agent G. S. Raghavachariar ... *Appellant** (*3rd respondent*)

v.

The Official Receiver of Tanjore and two others ... *Respondents* (*Petitioner and 1st and 2nd respondents*).

Arunachalam Chettiar *v.* Official Receiver of Tanjore.

Provincial Insolvency Act (*V of* 1920), *S.* 54—*Preference—What amounts to—Test for deciding—Debtor on the verge of bankruptcy—Threat of legal proceedings—If amounts to pressure—Onus—Evidence of similar transactions—If can be looked into.*

The word "preference" as used in S. 54 of the Provincial Insolvency Act does not connote priority in respect of payment of a debt, but it means in the context the favouring of one creditor to the detriment of others. In the sense of one creditor being given priority, the result of the transaction always is a preference of the creditor : reference in that sense is the occasion for the moving of the Court under S. 54. In deciding whether there has been a fraudulent preference the Court is bound to look at the motive and not at the result. The proper test to apply is to see if the debtor executed the deed with a view to protect himself or with a view to benefit the creditor.

Where a debtor is on the verge of bankruptcy, the threat of the issue of legal proceedings cannot be said to amount to pressure, and an inference of fraudulent preference can be drawn though the initial burden of proof is always on the Official Receiver to give some evidence of a view to prefer.

In deciding the question of motive, any act of the debtor at or about the time, any matters in *pari materia* may be looked into to see what was passing in his mind.

Case-law referred to.

Appeals against the orders, dated 27th September, 1923, of the District Court of West Tanjore respectively, in I. A. Nos. 502 and 501 of 1922 in I. P. No. 46 of 1921.

S. Srinivasa Aiyangar, K. V. Krishnaswami Aiyar, K. Narasimha Aiyangar, V. K. Srinivasa Aiyangar and *R. Sitarama Aiyar* for appellant.

K. Bhashyam Aiyangar, V. C. Viraraghavachariar and *S. Subramania Aiyar* for respondents.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS :—*Venkatasubba Rao, J.* :—Is the transaction impeached by the Official Receiver fraudulent under S. 54 *of the Provincial Insolvency Act?* The learned District Judge has come to the conclusion that it is and, in my opinion,

*A. A. O. Nos. 11 and 47 of 1924. 20th January, 1925.

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he is right. On the evidence, the debtors were heavily involved in October, 1921. They were threatened with suits and applications for attachment and arrest before judgment. There seemed to be very little hope of averting bankruptcy. In these circumstances they executed a mortgage in favour of the appellant, a Nattukottai Chetty. The debt due to him was about Rs. 10,900 and odd and this mortgage was executed to secure Rs. 10,000 out of that sum. There is little reason to doubt that Raghavachari who was then acting for the Chetty was aware of the condition of the debtors' affairs and of the fact that numerous other creditors were pressing them for repayment of amounts due. The other facts material for this appeal are the following :—The debtors were said to be possessed of property worth about a lakh and five thousand. Their debts were admitted to amount to about the same figure. The immoveable property over which the appellant was given security was worth Rs. 30,000. The debtors did not own any other immoveable property. They executed over the identical property at the same time two mortgages, one in favour of the appellant and the other in favour of third parties who have also filed an appeal before us and with whose appeal I shall presently deal. So far as the transaction impeached in that other appeal is concerned, I cannot but come to the conclusion that the security was created with the express object of preferring those creditors, namely, the appellants in the other appeal. A man by name Venkatramier plays a very prominent part in bringing about the two transactions. Indeed the facts relating to the two mortgages are so inextricably mixed with each other that it is impossible for the purpose of deciding the question at issue, to deal with each as absolutely disconnected with the other. A *ratham* (car) which the debtors allege, (in an affidavit to which our attention has been directed) was theirs, they appear to have also disposed of, about the 25th of October. They closed their place of business on the 26th and they were declared insolvents on the 1st November. It must be pointed out that the appellants are not related to the insolvents nor has it been shown by direct evidence that the debtors were interested in this particular creditor, the appellant.

On these facts, what is to be our finding under *S. 54 of the Insolvency Act ?*

The word 'preference' as used in this section does not connote priority in respect of payment of a debt ; that no doubt is one meaning of the word ' preference, ' but it means in the

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context the favouring of one creditor to the detriment of others. In the sense of one creditor being given priority the result of the transaction always is a preference of that creditor : reference in that sense is the occasion for the moving of the Court under S. 54. As Cozens-Hardy, J. puts in *Hastings Brothers* v. *The Stenotyper Limited* (1), "The Court is bound to look at the motive and not at the result." Lord Esher, M. R. in *New Prance and Garrard's Trustee* v. *Hunting* (2) expresses the same idea thus : "The question whether there has been a fraudulent preference depends, not upon the mere fact that there has been a preference but also on the state of mind of the person who made it." The learned Master of the Rolls applied the test :—Was the debtor actuated by any feeling of bounty towards the creditor or was he doing what he did for his own benefit ? In the words of Lord Macnaghten in *Sharp* v. *Jackson* (3) was the debtor under an overwhelming sense of imminent peril ? Did he have before his mind a sense of his dangerous position ? In other words, the test is, did the debtor execute the deed with a view to protect himself or with a view to benefit the creditors ?

English Judges dealing with this subject express the same idea also in a slightly different way. What is fraudulent within the policy of the Bankruptcy Law is a voluntary act of preferring one creditor to another. Preference imports the act of a person who is free to do either the one thing or the other as he prefers. But if an advantage is given to one creditor under pressure the act is not done voluntarily and there is no preference. Lord Halsbury cites with approval in *Sharp* v. *Jackson* (3) the following observations of Lord Cairns in *Butcher* v. *Stead* (4) :—

> "The Act, however, did not profess to express the existing law without making considerable changes in it. In the case of fraudulent preference, for example, in place of raising an inquiry whether it was done in contemplation of bankruptcy, the Act provided certain definite tests, namely, that the bankrupt should have been at the time unable to pay his debts, as they became due, from his own moneys, and that he should become bankrupt within three months from the date of payment. The Act appears to have left the question of pressure as it stood under the old law, and, indeed, the use of the word 'preference' implying an act of free will, would, of itself, make it necessary to consider whether pressure had or had not been used."

To the same effect are observations in my judgment in *Sriramulu* v. *Ponakavira Reddy* (5). After pointing out the

1. (1901) 1 Ch 250 at 255.
2. (1897) 2 Q B 19.
3. (1899) A C 419 at 427.
4. (1875) L R 7 H L 846.
5. (1923) 45 M L J 105 at 114.

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distinction between the scope of S. 53 of the Transfer of Property Act on the one hand and Ss. 36 and 37 of the old Provincial Insolvency Act on the other, I observe thus :—

"Wherever a voluntary transfer or a preference of a creditor on the one hand and adjudication of the transferor or the debtor on the other hand are brought into contiguity, the law peremptorily requires a certain inference to be made, enquiry is altogether excluded and the inference will not be allowed to be displaced by any contrary proof however strong."

In this passage and in the two sentences that followed it, it is in this sense that I used the words "prefer" and "preference." These words used in such context have acquired a well-defined meaning. The judgment of Lord Halsbury in *Sharp* v. *Jackson* (3) shows that by authority dating back more than a century this matter is now well settled.

The learned Lord also observes in the course of his judgment that preference is not voluntary not merely when there is pressure from fear of legal process but that pressure is not the less, because "it is pressure upon the debtor's own mind and his own consciousness—from an apprehension of what will happen if bankruptcy takes place ; not a pressure by threats of creditors to assert their rights."

The question of dominant motive does not arise in this case, because the object of the insolvents was either to benefit the creditor or to save themselves. There is no intermediate position. If, for instance, a relation of the debtors is preferred and the question arises, was he preferred because he was a relation or in order to make that creditor disinclined to proceed to extremities against them, in such a case, the question of overriding or dominant motive may arise. The motive then may be various and the Court may then be called on to determine which was the substantial motive. In this case no such question arises.

It is strongly urged for the appellant that the evidence discloses that he brought pressure to bear on the debtors and it was that pressure that was responsible for the giving of security. But what was the pressure worth ? The debtors were on the verge of bankruptcy. If one creditor was paid off, there was another creditor ready to file a suit and get arrests or attachments. The insolvency was in the case of these debtors a certain impending fact. Can it be said that in these circumstances the motive that operated on the mind of the debtors was the safeguarding of their own interests and the averting

3. (1899) A C 419.

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of unpleasant consequences? I cannot do better than adopt the language of Phillimore, J., in *In re Ramsay* (6): "And although in some cases a writ may be pressure, there are cases where writs are of absolutely no importance to the debtor, no terror; and in such cases I do not think that the threat of a writ or the issuing of a writ ought to be called pressure." There is a striking similarity in this respect between the facts of the present case and the facts with which Phillimore, J., had to deal and the test laid down by him seems to be particularly appropriate to the facts before us. I am quite alive to the fact that the onus is upon the Official Receiver. See *Williams on Bankruptcy, 12th Edition, page* 296, where the learned author observes thus:—

> "The balance of authority would seem, therefore, to be in favour of holding that the trustee must give some evidence of a view to prefer on the part of the debtor other than the mere fact that he was insolvent."

It is also true that the Official Receiver has not conducted his case with that care or diligence that is required of him. No reason has been shown why the insolvents have not been examined or why their account books have not been filed. Still, on a consideration of the circumstances, I am inclined to the view that the mortgage amounts to a fraudulent preference. One of the strongest reasons which has weighed with me in coming to this conclusion is, that the other mortgage deed which is the subject of the next appeal is undoubtedly a fraudulent transaction and, as I have observed, it is impossible in deciding the question of motive to treat the two transactions as absolutely distinct and separate from each other. As Phillimore, J., observed in the case I have referred to above "when one has to look into the mind of the bankrupt, any act of his at the time or about the time, any matters in *pari materia*, may be looked into to see what was passing in his mind." We confirm the order of the Lower Court and the appeal is accordingly dismissed with costs.

C. M. A. No. 47 *of* 1924:—It is unnecessary to repeat the facts which led to the filing of this petition by the Official Receiver, as I have just set them forth in the judgment delivered in the connected appeal. The facts that distinguish this from the other appeal are: (1) There is no evidence that the bulk of the consideration for the mortgage deed in favour of the appellant represents any real debt due by the insolvents. Neither Venkatramier nor the brother of the appellant has

6. (1913) 2 K B 80 at 85.

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been examined and there is no evidence that any amount was due to either of them. (2) It is not alleged that there was any written demand by the appellant for the repayment of his debt. If the amount that was due to the appellant was Rs. 1,200 and odd and to his daughter Rs. 500 and odd, why was the mortgage deed taken for Rs. 10,000 ? Why did the appellant undertake to pay a large sum of money to Venkatramier and why was a provision made for the payment of Rs. 900 and odd to the Chetty whose appeal we have just disposed of ? The more natural thing would have been to execute a mortgage deed in favour of the Chetty for Rs. 10,900. There is no satisfactory explanation for splitting this amount into two sums and execute two separate documents in respect of this debt. It is unnecessary to pursue this matter further, because there can be no doubt that the circumstances of the case lead only to one inference, namely, that the debtors executed the mortgage in question with the express object of giving an advantage to the appellant. The appeal, therefore, fails and is dismissed with costs.

Madhavan Nair, J.

Madhavan Nair, J. :—I agree, but I would add a few words. The main argument that has been put before us in connection with these two appeals on behalf of the appellants is that the two documents, Exs. A and B, have been executed on account of the "real" pressure that was brought to bear upon the insolvents by the respective appellants and therefore it cannot be said that these documents were executed with a view of preferring them to the other creditors under S. 54 of the Provincial Insolvency Act. The facts of the case do not support this view The two documents were executed on the 25th October, 1921. The business was practically closed on the 26th and the brothers were adjudicated insolvents on the 19th December, 1921. From their own statement it becomes clear that they were on the verge of bankruptcy at the time when Exs. A and B were executed. The statement of assets and liabilities referred to in their petition for *interim* protection shows that they were in very embarrassed circumstances. The oral evidence in the case makes it clear that they were parting with whatever property they had. One car which is referred to as belonging to them in their petition was transferred to a person named Singara Chetty and under these two documents A and B they parted with most of their immoveable properties. The evidence of the adjudicating creditor proves that they were hard pressed with the creditors' demands and that there were

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various creditors in their house when he went there to make his demand. Under these circumstances, we have to consider whether the written notice threatening legal proceedings that was sent by the appellant in C. M. A. No. 11 of 1924 on 10th October, 1921, and the oral demand made in the other case really operated on the minds of the insolvents in bringing about the execution of the documents in question. The facts show that at this time the insolvents being in desperate circumstances were trying to part with their immoveable property and the other assets at their disposal recklessly and desperately not caring as to what may be the consequences. The following observations of Phillimore, J. in *In re Ramsay* (6) may well be applied to the facts before us :—" And although in some cases a writ may be pressure, there are cases where writs are absolutely of no importance to the debtor, no terror ; and in such cases I do not think that the threat of a writ, or the issuing of a writ, ought to be called pressure." In view of the circumstances already pointed out it cannot be said that the two documents in these two cases were executed on account of genuine pressure. I therefore think that the conclusion of the learned Judge that these were executed by the insolvents in desperate circumstances and not on account of any real pressure is perfectly justified by the evidence. I agree that the appeals should be dismissed with costs.

T. S. V. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE KUMARASWAMI SASTRI.

Ry. V. Ayiswaryanandaji Saheb (died) and others ... *Appellants* (Plaintiffs 1 to 4, defendants 3 and 4, plaintiffs 5 and 6, legal representatives of the 2nd plaintiff, legal representatives of the 1st plaintiff, and legal representative of the 3rd defendant)*

v.

Ry. Sivaji Raja Saheb and others ...*Respondents (Defendants 1, 2, and 6 to 21).*

Ayiswaryanandaji Saheb v. Sivaji Raja Saheb.

Hindu Law—Religious endowments—Succession to trusteeship—Confiscation and re-grant—Effect of—Management by eldest member—Usage of institution—

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*Appeal No. 64 of 1920. 18th March, 1925.

6. (1913) 2 K B 80 at 85.

Ayiswarya-nandaji Saheb v Sivaji Raja Saheb.

Hindu widow—Income from husband's estate—Accumulations—Property purchased—If an accretion to husband's estate—Intention—Question of presumption—Stridhanam—*Inheritance—Husband's heirs—Illegitimate sons—If can inherit collaterally.*

Certain devasthanams which were in the possession and management of the Rajahs of Tanjore for the time being were taken possession of by the East India Company along with the Raj of Tanjore in 1855. In 1863 the devasthanams were restored to the Senior Rani, the widow of the late Rajah, but the Government did not indicate in their order the course of succession to be followed after her death. As a matter of fact, after her death the devasthanams were managed by each of the widows who in turn became the senior widow and on the death of the last of such widows in 1912, disputes arose as to who was entitled to the management. *Held,* in the case of religious institutions, the devolution of the trust upon the death of a trustee depends on the terms upon which the trust was created or the usage of each particular institution where no particular trust deed exists. In view of the facts that the devasthanams prior to the confiscation were annexed to the Raj of Tanjore which was impartible, that the Government in making the grant to the Senior Rani in 1863 did not indicate their intention to take away the impartible nature of the properties, that in 1863 it was thought it was the universal custom of the country that the eldest heir alone of a deceased trustee should succeed to the trusteeship and further as the usage of the devasthanams also was to have the management solely vested in the person who occupied the Raj for the time being, the trusteeship was impartible and could not be divided among all the heirs to the estate or the management directed to be held by turns.

Per Kumaraswami Sastri, J.—In cases of confiscation and re-grant of property which is impartible, the law is that in the absence of anything in the re-grant, the property re-granted is subject to the old incident of impartibility. The mere fact that there was a re-grant will not destroy the course of devolution followed till that date. Where there is no uniform course of conduct the interests of the institution should be the first consideration.

A Hindu widow has an absolute right of disposal over the income of the property which she inherits from her husband. She can either spend the same or accumulate it for her own benefit. In cases where she purchases properties or invests her savings and indicates by her conduct an intention that the properties purchased out of her savings should form part of her husband's estate, such savings should follow the same rules as regards devolution to her husband's estate and should be treated as accretions to the estate. Where she does not do so, she has absolute powers of disposal over such property and can sell or give the same to anybody she pleases without any right in the reversioners to question her alienations. Where the question is one of intention to be deduced or inferred from her conduct, the presumption is she intends to keep the property for her own absolute benefit and to have absolute powers of disposal over it. Where, however, a widow is not in possession of her husband's estate, there is no presumption that any of the properties which she gets are to be treated as accretions to her husband's estate nor can an intention be inferred that she wants to treat them as part of her husband's estate. On her death her properties would follow the same course of succession as her *stridhanam* properties.

Illegitimate sons of a Sudra have never been regarded by Indian Courts as heirs to their putative father's collateral relations and hence they cannot

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succeed to the *stridhanam* properties of their putative father's legally married wife.

Case-law on all the points discussed.

Appeal against the decree of the Court of the Subordinate Judge of Tanjore in O. S. No. 43 of 1913.

The Advocate-General, K. C. Gopala Desikan, A. Krishnaswami Aiyar, A. Krishnaswami Aiyangar and *T. L. Venkatarama Aiyar* for appellants.

T. R. Ramachandra Aiyar, C. Krishnaswami Rao, A. V. Visvanatha Sastri, T. R. Krishnaswami Aiyar, T. S. Anantharama Aiyar, S. Srinivasa Aiyar and *C. S Venkatachariar* for respondents.

The Court delivered the following

Spencer, J.

JUDGMENTS :—*Spencer, J.* :—Sivaji, the last Rajah of Tanjore, died in 1855. After his death the East India Company took possession not only of the Raj of Tanjore and the private properties of the late Rajah, but also certain pagodas and devasthanams which had been in his possession and management up to the date of his death. It was held by the Privy Council that the East India Company's usurpation of this property amounted to an act of State of which the ordinary Civil Courts could not take cognizance. Subsequently the Senior Rani Kamakshi Bai Saheba petitioned Government for a restoration of the estate and also of the devasthanams. The estate was restored by proceedings of the Madras Government, dated 21st August, 1862, which we have dealt with in another place. The order restoring the devasthanams was dated the 19th March, 1863.

In her memorial, dated the 24th December, 1862, Kamakshi Bai Saheba prayed that the pagodas and charitable institutions which had been founded from time to time by members of her family might be made over to her as the head of the family for the time being. She mentioned in her memorial that Mr. Phillips, the Commissioner of Tanjore, had in 1858 recommended the Government to make over these endowments to Sakharam Saheb, husband of the Princess, and that the Government refused to accept that recommendation. The Government Agent, in forwarding Kamakshi Bai's memorial, recommended her prayer to be granted on the ground that it was highly desirable that all connection with these religious institutions on the part of Government should cease. The Governor in Council concurred with the Agent's recommendation and ordered the pagodas to be made over to the Rani. In

doing so, the Government did not indicate the course of succession to be followed in the management of these endowments after Kamakshi Bai's death. Accordingly she managed the institutions till 1892, when she died.

Upon her death Government again took possession of the devasthanams and put them under the management of the Temple Committee of Tanjore. The next Senior Rani Umamba Bai brought a suit (O. S. No. 3 of 1894) for the recovery of these devasthanams and their endowments, basing her title on the fact that she was the Senior Rani and head of the family. She impleaded the Secretary of State for India, the members of the Tanjore and Kumbakonam Devasthanam Committees and the other Ranis as defendants in her suit. In a careful judgment, in which he set out the history of these institutions, Mr. Venkobachariar, then Subordinate Judge of Tanjore, came to the conclusion that the Government had no right to resume, or in any way interfere with, the management of the temples after granting them in favour of Kamakshi Bai, that they devolved as impartible property and that by the State grant restoring them Kamakshi Bai acquired heritable interestes in the properties. He decreed the suit in plaintiff's favour. There was an appeal to the High Court, which was heard by Shephard and Davies, JJ. Those learned Judges dismissed the appeal holding that the estate taken by the Senior Rani was in the nature of self-acquired property in her hands in the sense that her rights were derivative from Government and had no relation to inheritance on the death of the Rajah. They inferred from the fact that the plaintiff was chosen as the person to whom the trust should be made over in her capacity of widow of the late Rajah, that the intention of the Government was to grant her a widow's estate, that is, to put her in the position which she would have enjoyed had there been no confiscation on the death of her husband the Rajah.

After the death of Umamba Bai, the devasthanam estate was managed by each of the widows who in turn became senior widow until the last widow Jijamba Bai died in 1912. Disputes then arose between the children of the Rajah's sword wives, who are known as Mangala Vilas people, and the sons of the adopted son, who are defendants 1 and 2. The former brought O. S. No. 43 of 1913 in which they claimed the right to be declared entitled to the possession and management of the devasthanams and their endowments and also to share in the immoveable and moveable properties purchased by the widows of the late Rajah, which became accumulations and accretions

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to the private estate of the Rajah, to which they claimed to succeed either as his heirs or as heirs to the widows who acquired these properties as *stridhanam*.

The learned Subordinate Judge, in disposing of these and other properties of the Rajah, held that the acquisitions of the various Ranis having been purchased in their own names, became their separate estates ; and as regards the devasthanam properties, he held that the Government grant was to Kamakshi Bai by name as a single individual or sole trustee and that the endowments were therefore not capable of being made the subject of partition, but would pass to the head of the family for the time being, that individual at the time of suit being the 1st defendant, and he accordingly dismissed the suit.

In appeal, Mr. Alladi Krishnaswami Aiyar argued that the trusteeships of the devasthanams should follow the same line of inheritance as the private estate of the Rajah and that the Mangala Vilas people having been held entitled to share in the private estate, should also be given a share in the management of the temples, the Government having by their grant destroyed the incident of impartibility which once attached to the estate. In support of his arguments he relied on *Rajah Venkata Rao* v. *The Court of Wards* (1), *Ramanathan Chetty* v. *Murugappa Chetty* (2), the principles upon which this case was decided having been approved by the Privy Council in *Ramanathan Chetty* v. *Murugappa Chetty* (3) on *Sethuramaswamiar* v. *Meruswamiar* (4) from which there was an appeal to the Privy Council in *Sethuramaswamiar* v. *Meruswamiar* (5), which reversed the decision of this Court on *Meenakshi Achi* v. *Somasundaram Pillai* (6) and *Thandavaroya Pillai* v. *Shunmugam Pillai* (7).

For the respondent our attention was called to the fact that in the written statement of the 3rd defendant, who was one of the Mangala Vilas people, it was asserted that these properties were impartible and should descend to the senior member of the senior line according to the custom obtaining in the family of the late Rajah. In the Saptur case *Ramaswami Kamaya Naik* v. *Sundaralingaswami Kamaya Naik* (8)

1. (1879) I L R 2 M 128 (P C).
2. (1903) I L R 27 M 192 : 13 M L J 341.
3. (1906) I L R 29 M 283 : 16 M L J 265 (P C).
4. (1909) I L R 34 M 470 : 20 M L J 108.
5. (1917) I L R 41 M 296 : 34 M L J 130 (P C).
6. (1920) I L R 44 M 205 : 39 M L J 403.
7. (1908) I L R 32 M 167 : 19 M L J 59.
8. (1894) I L R 17 M 422.

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it was made clear that the son of a legally married wife is a preferable heir to impartible property over the son of a sword wife or concubine. The decisions in *Trimbak* v. *Lakshman* (9) where it was observed that religious offices were naturally indivisible, and in *Sri Raman Lalji Maharaj* v. *Sri Gopal Lalji Maharaj* (10), where it was observed that if there are no emoluments attached to an office of trustee, there was no reason to partition the property amongst junior members, were also cited. *Ramanathan Chetty* v. *Murugappa Chetty* (2), where Bhashyam Aiyangar, J. observed that the usage and custom in respect of religious trusteeships which were hereditary in a family, was generally that the office could be divided by getting the duties discharged in rotation by each member of the family and that the exceptions to that rule would only be a few cases in which the hereditary office may be descendible only to a single heir, was a case of family partition among Chetties of Sivaganga. It was not alleged in that case that there had been any trace of impartibility existing in the family prior to partition. In appeal in *Ramanathan Chetty* v. *Murugappa Chetty* (3) the Judicial Committee confirmed the decree of this High Court which provided for each member of the family taking one turn of management in succession, the grounds of their Lordships' decision being that there was an unbroken usage evidencing a family arrangement in this particular family and that that arrangement should hold good until altered by the Court or superseded by a new scheme. In *Meenakshi Achi* v. *Somasundaram Pillai* (6) the Chief Justice and Seshagiri Aiyar, J. observed that the course of decisions in this Presidency, which had the approval of the Judicial Committee, was opposed to the proposition that the office of a trustee in a public institution was indivisible and regulated by the same rules as the succession to impartible estates. The suit related to certain *kattalais* attached to a temple in the Tanjore District and the learned Judges held that a claim by the seniormost male member to manage alone among the heirs should be proved as a special custom. From the history of the case it appears that these *kattalais* were managed for some years by the Board of Revenue and that they restored the management and the enjoyment of the lands to two members of the family representing the senior and the junior branches.

2. (1903) I L R 27 M 192 : 13 M L J 341.
3. (1906) I L R 29 M 283 : 16 M L J 265 (P C).
6. (1920) I L R 44 M 205 : 39 M L J 403.
9. (1895) I L R 20 B 495. 10. (1897) I L R 19 A 428.

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In such a case, the usage of the institution was obviously opposed to the principle of management by a sole trustee. In Mayne's Hindu Law, paragraph 439, it is stated that the devolution of the trust upon the death or default of each trustee depends upon the terms upon which it was created, or the usage of each particular institution where no express trust deed exists.

In 1863, when Government restored the management of these temples to Kamakshi Bai, it was thought that it was the universal custom of the country that the eldest male heir of a deceased trustee should succeed as trustee to the person from whom he inherited. See *Purappavanalingam Chetty* v. *Nallasivan Chetty* (11). And in the Sivaganga case *Muttu Vaduganada Tevar* v. *Dora Singha Tevar* (12), the Privy Council recognised the principle that in re-granting an impartible zamindari and issuing a sanad, the Government could retain the quality of impartibility in respect of any of the property thereby restored. From the history of these institutions described in Mr. Venkobachariar's judgment in O. S. No. 3 of 1894, Ex. A-197, it appears that the Rajah of Tanjore founded several religious institutions and acquired lands and gave them as endowments to temples, that the pagodas were managed by Serfoji as hereditary trustee and that on his death his son Sivaji succeeded to all the rights and privileges of his father including the management of the pagodas. I am of opinion therefore that the founders of these institutions intended that their successors who occupied the Raj should continue to have the sole management of the temples and pagodas and the endowments attached to them. It follows therefore that to divide these properties among the many claimants to the estate of the late Sivaji would be a policy inconsistent with the intentions of the founder of the institution when he endowed the temples with lands. I am further of opinion that when Government restored these properties to Kamakshi Bai as "head of the family for the time being," they indicated their intention that they should continue to be managed by a sole trustee. If it were necessary for the 1st defendant to prove that sole trusteeship is an incident of this hereditary trust, I should be prepared to find it proved.

In this view, the Subordinate Judge was right in recognising the 1st defendant as being the lawful trustee who should manage these properties for his lifetime in his capacity of head

11. (1863) 1 M H C R 415. 12. (1881) I L R 3 M 290 (P C).

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—
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of the family, and I consider that the appeal should be dismissed so far as these properties are concerned.

Next as regards the purchases of immoveable and moveable properties made by the widows out of their savings, and as regards their jewels, it must be remembered that the Ranis were only receiving a small income from the Mokhasa estate and pensions of Rs. 800 a month sanctioned by Government, and that from 1867 till the date of suit a Receiver was in charge of the estate. Thus the present is not an instance of a widow in possession of her husband's estate making acquisitions out of income, in which case the Privy Council declared in *Nabakishore Mandal* v. *Upendrakishore Mandal* (13) that the acquisitions would become accretions to the husband's estate unless it were shown that she dealt with it in such a manner that it would remain her own [*vide* also *Mussumat Bhagbutti Daee* v. *Chowdry Bholanath Thakoor* (14)].

Whether the after-purchases form accretions to the *corpus* of a deceased husband's estate or *stridhanam* of the widow depends upon her intention, which has to be gathered in every case from her manner of dealing with the property [vide *Issri Dutt Koer* v. *Hansbutti Koerain* (15), where the authorities are reviewed, and later cases in *Akkanna* v. *Venkayya* (16) and *Subramaniam Chetty* v. *Arunachalam Chetty* (17) and *Babu Sheo Lochun Singh* v. *Babu Saheb Singh* (18)].

In every case it is a question of fact whether a widow has dealt with the income of her husband's property in such a manner as to make it an accretion to the *corpus* [vide *Rajah of Ramnad* v. *Sundara Pandiyasami Tevar* (19)].

As for presumptions, when it is shown that the *corpus* of the estate has been all along in the possession of a Receiver or of the Court of Wards, as was the case in *Saodamini Dasi* v. *The Administrator-General of Bengal* (20), and in *Rajah Parthasarathy Appa Rao* v. *Rajah Venkatadri Appa Rao* (21) and here, there is no room for presuming that the widow intended to make the investments of the funds received by her part of her husband's estate, when she did not get her husband's estate into her possession.

As for Item 3 in Sch. D-1 which is an acquisition of Anusamba Bai Saheba who died in 1895, she wrote a letter, A-186,

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13. (1921) 42 M L J 253 (P C.). 14. L R (1875) 2 Ind. App. 256.
15. (1883) I L R 10 C 324 (P C). 16. (1901) I L R 25 M 351.
17. (1904) I L R 28 M 1. 18. L R (1887) 14 Ind. App. 63.
19. (1918) I L R 42 M 581 : 36 M L J 164 (P C).
20. (1892) I L R 20 C 433 (P C). 21. (1922) I L R 46 M 190 : 43 M L J 486.

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to the Collector announcing her intention to create a trust in favour of the adopted son's son and received a reply A-187 acknowledging her letter.

As regards jewels of Jijamba Bai, it is stated in the written statements of defendants 1 and 2 that they were purchased out of the savings from her own income, and there being no evidence *contra*, the Subordinate Judge was right in treating them as her absolute property.

Lastly, assuming that these properties were the self-acquisitions of the widows, the appellants claim to be *sapindas* and to have a right to succeed to the *stridhanam* of widows who were married in an approved form, on the ground that it goes on their deaths without issue to the heirs of their husband.

In *Subramania Aiyar* v. *Rathnavelu Chetty* (22) it was held by a Full Bench that the illegitimate son of a Sudra ranked as a *sapinda* of his putative father, and that the latter was entitled to succeed to his property if he died without issue.

But the Full Bench recognised the fact that an illegitimate son had never been regarded by any of the Courts in India as an heir to his putative father's collateral relations, and that the authorities against such a proposition were very strong (see page 72). I am not satisfied that there are sufficient grounds to reconsider that statement of the law as it now stands. The reason for giving an illegitimate son a half share of what a legitimate son of a Sudra gets is morally justifiable on the ground that he has a legal right to be maintained by his putative father, but there is no legal obligation to maintain illegitimate children of collaterals.

The result is that the appeal of the Mangala Vilas parties in this suit is dismissed.

The costs of appellants and respondents 1 and 2, so far as the appeal relates to the devasthanam estate, will be payable out of the income of the devasthanam estate, as it was necessary to have the question of devolution of the trust finally settled; but the appeal, so far as accretions and accumulations are concerned, is dismissed with costs of respondents 1 and 2.

The memorandum of objections is also dismissed with costs of respondent 1.

Kumaraswami Sastri, J.

Kumaraswami Sastri, J. :—This appeal relates to the devasthanam known as the Fort or Palace Devasthanam and the endowments founded by the Rajahs of Tanjore and to the

22. (1917) I L R 41 M 44 : 33 M L J 224 (F B)

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share of the plaintiffs in the immoveable properties described in the plaint which were purchased and enjoyed by the widows of Sivaji Maharajah who was the last Rajah of Tanjore. Claim is also made to the jewels and moveables left by the Ranis.

The plaintiffs and the 3rd and 4th defendants represent the illegitimate branch and the 1st and 2nd defendants are the grandsons of the late Sivaji Maharajah, the last ruler of Tanjore, being the sons of Serfoji who was adopted by Kamakshi Bai Saheba. The other defendants are alienees from one or other of the Ranis.

The plaintiffs sued for the trusteeship and possession of the devasthanam properties and for the recovery of possession of the *stridhanam* properties left by the widows on the ground that they and the 3rd and 4th defendants are the sons of the sword wives of the late Rajah and for a declaration that the 1st and 2nd defendants have no rights as the adoption of their father is invalid, that the alienations by the widows in favour of the other defendants are invalid beyond the lifetime of the widows and that the plaintiffs as heirs are entitled to succeed. The contesting defendants denied that the plaintiffs and the 3rd and 4th defendants have any right as the sons of sword wives to the devasthanam and other properties and stated that the alienations by the widows could not be questioned or set aside by the plaintiffs. The Subordinate Judge dismissed the plaintiffs' suit. As regards the devasthanam properties he held that the grant by the Government was to a single individual or sole trustee and there can be no claim for participation. It would therefore pass to the head of the family for the time being and that the 1st defendant, as the senior representative, was entitled to be the sole trustee. As regards the other properties he held that the properties claimed were the *stridhanam* properties of the Ranis and not accretions to the Raj and that the plaintiffs and the 3rd and 4th defendants were not the heirs to the *stridhanam* properties. He dismissed the plaintiffs' suit and hence the appeal.

The 2nd defendant filed a memorandum of objections against that portion of the decree which declared that the 1st defendant was entitled to be the sole trustee. His case is that he is entitled along with the 1st defendant to be the trustee of the devasthanam properties.

We have held in the appeals which relate to the private properties of Sivaji Maharajah that the plaintiffs and the 3rd and 4th defendants formed the illegitimate branch, that the

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Tanjore Rajahs were Sudras by caste and that the illegitimate sons and their branch of the family who are known as the Mangala Vilas branch were only entitled to the shares which the illegitimate sons of a Sudra would take in their father's properties. We also held that the adoption of the father of the 1st and 2nd defendants was valid and that the 1st and 2nd defendants as the adopted sons of the late Rajah were entitled to inherit his properties and we ordered a partition of the private properties between the legitimate and the illegitimate branches. In disposing of this appeal it is clear that the claim of the plaintiffs in the plaint must be viewed from the standpoint of the above findings, and they can only get such rights as the law confers on the illegitimate sons of a Sudra.

The questions which arise for determination in this appeal are—(1) Whether under the terms of the grant by the Government the trusteeship of the devasthanam properties vests in all the heirs of Sivaji Maharajah, the last Ruler of Tanjore, like ordinary partible property and has to be managed by turns by each of such branches or whether it vests in the senior male member of the eldest branch of the family for the time being; (2) whether the properties acquired by the widows of the late Sivaji Maharajah were accretions to the estate and consequently divisible between such persons as would be entitled to a partition of the estate or whether they were the *stridhanam* properties of the widows who made the acquisitions and are descendible to the *stridhana* heirs; and (3) if the properties are *stridhanam* properties, whether the plaintiffs and the 3rd and 4th defendants would be entitled to a share.

As regards the trusteeship of the devasthanam and other trust properties, I am of opinion that the Subordinate Judge is right. The devasthanam and other endowments were taken charge of by the Government along with the Raj and the private estate of the last Rajah on his death. We have in our judgment in the appeals from the main case traced the course of events from the confiscation of the Raj to the death of his last Rani. Kamakshi Bai Saheba, the senior widow and Rani, got possession of the private properties of the Rajah under the terms of the grant (Ex. A-46), dated the 21st August, 1862. She petitioned the Government for the restoration to her of the devasthanam and other trust properties, and the Government by their order, dated the 19th of March, 1863, put her in possession of such properties. From 1863 to 1892 Kamakshi Bai Saheba was managing the properties as the sole

trustee, and although a Receiver was appointed in 1865 in the litigation between Kamakshi Bai Saheba and her co-widows, the Receiver did not take possession of the devasthanam properties and Kamakshi Bai Saheba was managing them as the sole trustee. On the death of Kamakshi Bai Saheba the Government took possession of the trust properties and Umamba Bai Saheba who was then the senior Rani filed Original Suit No. 3 of 1894 against the Secretary of State and the members of the Devasthanam Committees of Tanjore and Kumbakonam and the other surviving Ranis for a declaration of her right to succeed to the office and for possession of the properties. The Subordinate Judge in an exhaustive judgment decreed in favour of the plaintiff and the judgment has been filed as Ex. A-197 in the suit. He held that on a construction of the Government grant of 1863 the restoration of the management of the pagoda to Kamakshi Bai Saheba carried with it heritable right and that the right was transmissible to her heirs, the Government having no right to resume or interfere with the management of the temple after the death of Kamakshi Bai Saheba. He was also of opinion that succession to the management should be traced in the same way as succession to the impartible Raj ; that on the death of Kamakshi Bai Saheba the right did not vest jointly in the surviving widows and that the plaintiff as the senior widow was entitled to succeed. Against this judgment there was an appeal filed to the High Court which is reported in *Kaliana Sundaram Aiyar* v. *Umamba Bayi Saheba* (23). The decision of the Subordinate Judge was confirmed and it was held by Shephard and Davies, JJ., that the estate taken by Kamakshi Bai Saheba under the grant was in the nature of self-acquired property in the Rani's hands in the sense that her rights were derived from Government and had no relation back to inheritance on the death of the Rajah and that as she asked that the management should be put in her hands in the capacity as the head of the family for the time being, the inference was that the intention was to grant a widow's estate, that is, to put Kamakshi Bai Saheba in the position which she would have enjoyed had there been no confiscation on the death of her husband the Rajah. This decision does not, however, conclude the question as to whether on the death of the last of the Ranis the trusteeship and management was to be in the senior member of the family or whether it was to be treated as a right which should be enjoyed by all the mem-

23. (1897) I L R 20 M 421 : 7 M L J 324.

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bers who were to divide the private properties of the Rajah. So far as the terms of the grant go, the Government order putting Kamakshi Bai Saheba in management of the devasthanam properties differs in several respects from the grant of 1862 and the order of the 19th of March, 1863, simply says that it is desirable that the connection of Government with the pagodas should cease and they will accordingly be made over to Her Highness Kamakshi Bai Saheba.

In dealing with the question of management of the trust property, I think the first question to be considered is the usage as regards the management prior to the death of Sivaji Maharajah, the last Ruler of Tanjore. There can be little doubt, and it is not seriously contended before us by the appellants, that this temple and the charities which were founded by the successive Rajahs of Tanjore were in the possession and management of the Rajah for the time being and that till the death of Sivaji the office was always held by a single individual. When the Raj was seized by the Government as an act of State, the pagodas and the devasthanams were also taken possession of and managed by the Government ; but they were not desirous of taking upon themselves the responsibility of managing the temple and the devasthanam properties. The Government at one time wanted that the devasthanams should be made over to Sakharam Saheb, the son-in-law of Sivaji Maharajah, as sole trustee. Sakharam Saheb had married the elder daughter of the late Maharajah and on her death he married the younger daughter. As, however, there were disputes between Sakharam Saheb on the one side and Kamakshi Bai Saheba on the other, this proposal was not given effect to. In 1860 there was an idea of transferring the management to Avu Bai Saheba, the late Rajah's mother, but she was not willing to assume management. After Kamakshi Bai Saheba got possession of the private properties of the Rajah, she claimed the restoration of the devasthanams and the endowments on the ground that they were vested in her husband and that she was the then head of the family. Her request was supported by the Government Agent and the outcome of it was the order of 1863 transferring the management to her. From 1863 till her death in 1892 she was the sole trustee and it was till then nobody's contention that the office of trustee could partake of the nature of private property and that each of the surviving Ranis was to have the management by turns and although the Receiver took possession of all the private properties, the trust properties

were left in the possession and management of Kamakshi Bai Saheba. On her death the next senior Rani was, as the result of the suit which I have already referred to, put in possession and management and on the death of each senior Rani the junior succeeded. I am unable to find anything either in the Government order or in the surrounding circumstances which changed the usage prevailing as regards these institutions, namely, the management by a single individual who was the head of the family for the time being and which rendered it subject to all the incidents of partible property.

In cases of religious institutions the main question to be considered is what was the usage of the institutions ; and where from the date of the foundation of these charities up to the date of the present suit the trust was managed by a single individual who was the head of the family not in possession of any partible property, I think it would require very strong evidence to show that there is anything in the grant by the Government of 1862 which introduced a new course of devolution and would make it subject to all the incidents of a trusteeship held by a member of a joint and undivided family. As I said before, there is nothing in the grant of 1862 which either expressly or by implication changed the usage of these institutions. They formed part of the Tanjore Raj and the Rajah for the time being was the trustee. As regards the private properties which were restored by the order of 1863 there are express words which make the grant subject to the ordinary Hindu Law applicable to partible properties and the properties were to descend according to Hindu Law. There are no such words in the grant of the devasthanam properties to Kamakshi Bai Saheba. The devasthanams having been part of the Tanjore Raj and the trusteeship having devolved on the Rajah for the time being, the right of management till the confiscation by the East India Company must be treated as impartible property and the office as one which was held only by a single individual.

It was of course open to the Government to destroy that character and to grant the office on such terms as to succession as it thought fit. The confiscation having destroyed all antecedent rights there can be no question of any vested rights as to succession to the office. I am unable to infer from the mere fact that Kamakshi Bai Saheba applied for possession of the devasthanam properties as senior widow and was put in possession, the course of succession to the office changed. Even if there was no confiscation, the office vested in the senior mem-

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ber of the Rajah's family. In cases of confiscation and regrant of property which is impartible, the law is that in the absence of anything in the regrant, the property which is regranted is subject to the old incident of impartibility. In *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (24), the zamindari of Hunsapore which was an impartible Raj and which descended to the eldest male heir according to the rule of primogeniture was confiscated by the East India Company and was in the possession of the Government for some years. It was then granted to the younger member of the family of the deposed Rajah. It was held that although the zamindari was to be treated as the self-acquired property of the grantee, the grant being from the Ruling Power, in the absence of evidence of the intention of the grantors to the contrary, carried the incidents of the family tenure as a Raj. In *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar* (12), the Sivaganga Zamindari which was originally impartible was confiscated by the Government and regranted and it was held by their Lordships of the Privy Council that the regrant did not make the estate partible. A similar view was also taken by their Lordships in *Ram Nundun Singh* v. *Janki Koer* (25), where it was held that the confiscation and regrant of an impartible Raj to the various members of the family did not make the property regranted partible. The mere fact that there was a regrant would not, in my opinion, destroy the course of devolution followed till that date.

Great reliance was placed by Mr. Krishnaswami Aiyar for the appellants on the decision reported in *Ramanathan Chetty* v. *Murugappa Chetty* (2), which was affirmed by their Lordships of the Privy Council in *Ramanathan Chetty* v. *Murugappa Chetty* (3). In that case the question was as to the validity of an arrangement come to by the members of an undivided family regarding the management by turns of a devasthanam which was hereditary in the family. The question turned upon the usage as regards the management, and Benson and Bhashyam Aiyangar, JJ., in the course of their judgment, observe : "Except in the few cases in which the hereditary office may be descendible only to a single heir, the usage and custom generally is that along with other properties the office also is divided in the sense that the office is agreed to be held

2. (1903) I L R 27 M 192 : 13 M L J 341.
3. (1906) I L R 29 M 283 : 16 M L J 265 (P C).
12. (1881) I L R 3 M 290 (P C). 24. (1867) 12 M I A 1.
25. (1902) I L R 29 C 828 (P C).

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and the duties thereof discharged in rotation by each member or branch of the family, the duration of their turns being in proportion to their shares in the family property." Their Lordships of the Privy Council rest their decision on the usage as regards the trusteeship. Lord Macnaghten in delivering the judgment of their Lordships observes as follows :—

> "In their Lordships' opinion the case is a very simple one. They think the unbroken usage for a period of nineteen years is as against the appellant conclusive evidence of a family arrangement to which the Court is bound to give effect."

It is on this sole ground that they held that there was nothing improper in the arrangement.

There can be little doubt that the Hindu text-writers treated a trusteeship or a right to the management of religious or charitable endowments as impartible property. In *Mancharam* v. *Pranshankar* (26) it was pointed out that the management of religious endowments is indivisible though modern custom has sanctioned a departure by allowing the parties entitled to officiate by turns. This decision was followed in *Trimbak* v. *Lakshman* (9). The inconvenience of such a custom was also pointed out. Candy and Ranade, JJ., observed :—

> "It is clear that if the present claim of the appellant were recognized, each of the sons of the parties—and they have many—might claim a share not only in the family share but in the devasthan share and office also, and this process might go on with each generation, frittering away the income, and making the service wholly ineffective. The Lower Court appears to have assumed, without any such evidence as is suggested in *Mohunt Ruman Dass* v. *Mohunt Ashbul Dass* (27), that the office is partible with the income. The practice of many generations of the parties must be considered in settling the questions of impartibility, and that practice is in this case against partition with one single exception of what took place in 1838."

This case was cited with approval by their Lordships of the Privy Council in *Sethuramaswamiar* v. *Meruswamiar* (5).

Where impartibility and management by a single individual who was the eldest member of the eldest branch of the family has been the rule from the foundation of the trust till the date of the present suit, I find nothing either in *Ramanathan Chetty* v *Murugappa Chetty* (2) or *Ramanathan Chetty* v. *Murugappa Chetty* (3), which compels us to hold that the office should be treated as partible property and that on partition of the other properties of the family, this office should be

2. (1903) I L R 27 M 192 : 13 M L J 341.
3. (1906) I L R 29 M 283 : 16 M L J 265 (P C).
5. (1917) I L R 41 M 296 : 34 M L J 130 (P C).
9. (1895) I L R 20 B 495.
26. (1882) I L R 6 B 298.
27. (1864) 1 W R 160.

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held by turns. I may also point out that, having regard to the numerous descendants of the late Rajah who would, if the office is held to be partible, be entitled to turns of management and having regard also to the future growth of the family, it would be against the interests of the trust to give the numerous parties turns of management and I am not prepared to do so unless compelled either by the established usage of the institution or the terms of the regrant by the Government. I think the proper rule in such cases is to see whether there is any deed constituting the trust and regulating the course of devolution of the trust. If there is such a document, then the devolution will, of course, be regulated by the terms of the document constituting the trust. If there is no such document, the Court has to see what was the usage of the institution and to give effect to such usage. Where there is no uniform course of conduct, the interests of the institution should be the first consideration. If the management can, without detriment to the trust, be held by turns, it is open to the Court to decree management by turns. I have not been referred to any *texts* which state that the office of dharmakartha or trustee of a religious or charitable endowment is to be treated as joint property on partition and that turns have to be given to each member of the undivided family who gets a share in the partition irrespective of the interests of the charities. I do not find anything in the decision of their Lordships of the Privy Council in *Ramanathan Chetty* v. *Murugappa Chetty* (3) to warrant the rule that even in the case of public charities and trusts the claims of the dividing co-parceners should override the interests of the institution and the observations of their Lordships in *Sethuramaswamiar* v. *Meruswamiar* (5) rather suggests that the rule laid down as to turns of management on partition applies only to private charities.

I find it difficult to accept the argument of Mr. Venkatachariar for the 2nd defendant that the management should be confined to the 1st and 2nd defendants by turns to the exclusion of the illegitimate sons. Either the office is impartible and descends on the eldest member of the senior line or it should be treated as partible and turns given to all those who are entitled to share in the family properties. There is no principle on which the office can be confined to the 1st and 2nd defendants to the exclusion of the Mangala Vilas branch.

3. (1906) I L R 29 M 283 : 16 M L J 265 (P C).
5. (1917) I L R 41 M 296: 34 M L J 130 (P C).

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As regards the properties left by the last Rani in respect of which partition is claimed, I do not think the plaintiffs are entitled to any share. I do not think that the properties acquired by the Ranis can be said to be accretions to their husbands' estate and to devolve upon the persons who would be entitled as reversioners to their property. From the year 1866 up till the date of this suit there was a Receiver in charge of the estate and none of the widows were in possession or management. I have in my judgment in the suit relating to the private properties of the late Rajah given my reasons for holding that the estate was not strictly a Hindu widow's estate but that the grant by the Government was on terms which were analogous to it. It was held in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (29) that whatever rights the widows would have enjoyed had they succeeded to the estate of the late Rajah under Hindu Law were destroyed by the grant of 1862 which was to be regarded as the root of title. Each Rani got about Rs. 9,600 a year as pension from the Government. The widows had their own properties and had also jewels and there is nothing to show that the properties now claimed were acquired with the income of the estate left by their husbands and not with the savings from their pensions or dealings with their own *stridhanam* properties. Before the plaintiffs can claim the properties as accretions to the husbands' estate, they must show that the properties were purchased out of the income of the estate or out of the savings therefrom. There is no evidence that the acquisitions by the Ranis were treated as part of their husbands' estate or mixed up with it, but on the contrary we find that the Ranis were anxious to dispose of the properties which they had acquired. It is difficult to see how there can be said to be any accretions to the estate left by their husbands.

So far as this Presidency is concerned, the authorities are to the effect that there is no presumption that property acquired by a Hindu widow out of funds which were at her absolute disposal would form part of her husband's estate. I have dealt with this question in *Rajah Parthasarathy Appa Rao* v. *Rajah Venkatadri Appa Rao* (21). In *Rajah of Ramnad* v. *Sundara Pandiyasami Tevar* (19) their Lordships of the Privy Council observe :—

19. (1918) I L R 42 M 581 at 588 : 36 M L J 164 (P C).

21. (1922) I L R 46 M 190 at 220 : 43 M L J 486.

29. (1868) 3 M H C R 424.

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"Their Lordships think the answer to this is that a widow may so deal with the income of her husband's estate as to make it an accretion to the *corpus*. It may be that the presumption is the other way. A case has been cited to their Lordships which seems so to say. But at the outside it is a presumption and it is a question of fact to be determined, if there is any dispute, whether a widow has or has not so dealt with her property."

The case referred to seems to be *Akkanna* v. *Venkayya* (16) which was referred to in the course of the argument by Mr. De Gruyther.

It is argued by Mr. Krishnaswami Aiyar that the decision of the Privy Council in *Nabakishore Mandal* v *Upendrakishore Mandal* (13) has settled the question which was left in doubt in *Rajah of Ramnad* v. *Sundara Pandyasami Tevar* (19). There is an observation of their Lordships at page 256 to the following effect :—

"Now there can, their Lordships think, be no doubt that whatever *stridhan* she possessed was due to the accumulated savings from the income of the property which she received from her husband's estate, and though it is true that when that property had been received it would be possible for her so to deal with it that it would remain her own, yet it must be traced and shown to have been so dealt with, and in this case there is no sufficient evidence of this having been done."

It is argued that the effect of this observation is that the onus is on the other side to show that she did something which would indicate an intention of treating the accretions as her own and not as part of her husband's estate. The previous decisions of the Privy Council are not referred to by their Lordships and I do not think this case can be said to overrule all the previous decisions of their Lordships on the subject.

I am of opinion that the decision in *Saodamini Dasi* v. *The Administrator-General of Bengal* (20) is a clear authority for the view that where a widow is not in possession of her husband's estate there can be no question of any purchase made by her being an accretion to her husband's estate. Their Lordships of the Privy Council observe :—

"The appellant's counsel contended that the savings of a Hindu widow must be presumed to have been made for the benefit of her husband's estate. Without examining the precise result of the decisions, it is sufficient to say that in this case there is no room for any such presumption, for the *corpus* of the estate never came to the widow but was taken away by Sham Charan Mullick under the will, and the income to which the widow succeeded was separated from it, and became and was dealt with as an entirely separate fund."

I think the result of the authorities may be summed up as follows :—A Hindu widow has an absolute right

13. (1921) 42 M L J 253 (P C). 16. (1901) I L R 25 M 351.
19. (1918) I L R 42 M 581 : 56 M L J 164 (P C).
20. (1892) I L R 20 C 433 at 443 (P C).

of disposal over the income of the property which she inherits from her husband. She can either spend the same or accumulate it for her own benefit. In cases where she purchases properties or invests her savings and indicates by her conduct an intention that the properties purchased out of her savings should form part of her husband's estate, such savings should follow the same rules as regards devolution to her husband's estate and should be treated as accretions to the estate. Where she does not do so, she has absolute powers of disposal over such property and can sell or give the same to anybody she pleases without any right of the reversioners to question her alienations. Where the question is one of intention to be deduced or inferred from her conduct, the presumption is she intends to keep the property for her own absolute benefit and to have absolute powers of disposal over it. Where, however, a widow is not in possession of her husband's estate, there is no presumption that any of the properties which she gets are to be treated as accretions to her husband's estate nor can an intention be inferred that she wants to treat them as part of her husband's estate. On her death such properties would follow the same course of succession as her *stridhanam* properties.

The claim in this appeal relates to the properties left by (1) Umamba Bai Saheba who died on the 4th of July, 1900, possessed of items 1 and 2 in schedule D-1 to the plaint, (2) Anusamba Bai Saheba who died on the 30th September, 1895, leaving item 3 in Schedule D-1, and (3) Jijamba Bai Saheba, the last surviving widow. It is alleged that the properties in schedule E to the plaint were left by Jijamba Bai Saheba.

As regards item 3 in schedule D-1 which is the acquisition of Anusamba Bai Saheba, the evidence is that on her death Serfoji got possession of the property and after him his son, the 1st defendant, got possession. She also wrote to the Government Agent that she wanted to give the property to the adopted son and she made a settlement. The evidence, oral and documentary, shows that on her death in 1895 Serfoji got into possession in accordance with the settlement made by Anusamba Bai Saheba. The claim to item 3 by the present plaintiffs is therefore clearly barred by limitation, even assuming that the plaintiffs are her heirs.

As regards the properties of Jijamba Bai Saheba, the last Rani, she has left a will disposing of her properties, and it

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follows that the plaintiffs can have no claim, she, in my opinion, having had full disposing power over the savings from her husband's estate, her pension, and her own *stridhanam* jewels.

As regards properties left by Umamba Bai Saheba, she died in 1900 and Jijamba Bai Saheba took possession of her properties. She claimed to be the heir of Umamba Bai Saheba and it does not appear that she claimed anything more than a co-widow's right to succeed. It is now settled law that there is no distinction as to the nature of the estate taken between property inherited by a woman from a male and property inherited from a female. In both the cases she takes not an absolute estate but only a qualified one. I need only refer to *Venkataramakrishna Rau* v. *Bhujanga Rau* (30), *Veerasangappa Shetti* v. *Rudrappa Shetti* (31), and to the decision of their Lordships of the Privy Council in *Sheo Shankar Lal* v. *Debi Sahai* (32) and *Sheo Partab Bahadur Singh* v. *The Allahabad Bank* (33). This being so, it follows from the decision of their Lordships of the Privy Council in *Lajwanti* v. *Safa Chand* (34), that a suit which is filed within twelve years of Jijamba Bai Saheba's death would not be barred. As Umamba Bai Saheba did not make any disposition of the properties, the question is who are the heirs to the properties left by her at the time of her death which were in the possession of her co-widow Jijamba Bai Saheba. The plaintiffs belonging to the illegitimate branch and being the descendants of the last Rajah in existence, the question is whether under Hindu Law they can succeed to the estate of the Ranis, and this turns on the question whether in the case of Sudras the illegitimate sons have got any right to collateral succession.

It is argued by Mr. Krishnaswami Aiyar that in the absence of son, daughter and daughter's son the *stridhanam* property goes to the husband and his heirs, and that if you come to the point where there are no such heirs as abovenamed, you have to make no difference between the husband's property and the *stridhanam* property of the wife and all her husband's heirs will be entitled to succeed. He, therefore argues that even if the property left by Umamba Bai Saheba who died issueless was her *stridhanam* property, succession must be traced as if it was the property of her husband and as the

30. (1895) I L R 19 M 107 : 6 M L J 16.
31. (1895) I L R 19 M 110 : 6 M L J 3.
32. (1903) I L R 25 A 468 : 13 M L J 330 (P C).
33. (1903) I L R 25 A 476 : 13 M L J 336 (P C).
34. (1924) L R 51 I A 171 : 47 M L J 935.

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illegitimate sons would succeed along with the legitimate sons to the properties of their father, they would also succeed to the *stridhanam* properties in the same proportion. Reference has been made to the decision of their Lordships of the Privy Council in *Bai Kesserbai* v. *Hunsraj Morarji* (35), where their Lordships refer to Mitakshara, Mayukha and the texts of Brihaspati as regards succession to *stridhanam* properties and hold that in the case of approved forms of marriage the heirs enumerated by Brihaspati who are blood relations of the husband would succeed to the woman's property. Reference is also made to *Nanja Pillai* v. *Sivabagyathachi* (36), where it was held that the *stridhanam* property of a woman married according to the approved form who has left no issue will devolve on her husband and on failure of the husband the property will go to his *sapindas* in the order laid down in Mitakshara with reference to the succession to the property of a male and to *Kanakammal* v. *Ananthamathi Ammal* (37), where a similar rule has been laid down. Were the matter *res integra,* I am disposed to hold that in the case of Sudras an illegitimate son is in the same position as a legitimate son except that he gets a lesser share. The fact that an illegitimate son gets a lesser share would not by itself create a bar to collateral succession any more than the fact that an adopted son who exists along with a natural son born subsequently and who gets a lesser share would be barred. But there is a long catena of cases beginning with *Nissar Murtojah* v. *Kowar Dhunwunt Roy* (38), which decide that an illegitimate son has no right to collateral succession. I have in *Subramania Aiyar* v. *Rathnavelu Chetty* (22) referred to all the authorities and dealt fully with the illegitimate son's rights and as regards the position of an illegitimate son to collateral succession. The right was negatived in *Krishnayyan* v. *Muttusami* (39); *Ranoji* v. *Kandoji* (40); *Parvathi* v. *Tirumalai* (41); *Shome Shanker Rajendra Varere* v. *Rajasar Swami Jangam* (42); *Ramalinga Muppan* v. *Pavadai Goundan* (43); *Meenakshi* v. *Muniandi Panikkan* (44); *Dharma Lakshman* v. *Sakharam Ramjirao* (45), and *Ziptu* v. *Bomtya* (46).

22. (1917) I L R 41 M 44 : 33 M L J 224 (F B).
35. (1906) I L R 30 B 431 (P C).
36. (1911) I L R 36 M 116 : 21 M L J 850. 37. (1912) I L R 37 M 293.
38. (1863) Marshall's Reports 609. 39. (1883) I L R 7 M 407.
40. (1885) I L R 8 M 557. 41. (1887) I L R 10 M 334.
42. (1898) I L R 21 A 99. 43. (1901) I L R 25 M 519 : 11 M L J 399.
44. (1914) I L R 38 M 1144 : 27 M L J 353. 45. (1919) I L R 44 B 185.
46. (1921) I L R 46 B 424.

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The plaintiffs are not entitled to Umamba Bai Saheba's property as heirs under Hindu Law. The appeal fails and is dismissed. The memorandum of objections is also dismissed. I agree to the order as to costs proposed by my learned brother.

This Appeal having been posted to be spoken to this day on the question of costs allowed to the 1st respondent on the memorandum of objections filed by the 2nd respondent, the Court made the following

ORDER :—In modification of our original order we direct that the 1st respondent do get his costs of the memorandum of objections out of the devasthanam estate and the second respondent will bear his own costs in his memorandum of objections.

T. S. V. — *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR CHARLES GORDON SPENCER, *Officiating Chief Justice*, MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE KRISHNAN.

Adusumilli Gopalakrishnayya and another ... *Petitioners* (Appellants in S. A. No. 883 of 1923 on the file of the High Court)*

v.

Adivi Lakshmana Rao ... *Respondent (Son of respondent in do).*

F. B.

Gopalakrishnayya v. Lakshmana Rao.

Civil Procedure Code, S. 153—Appeal against dead respondent—Amendment of cause-title—Insertion of name of legal representative of respondent—If to be allowed—Procedure—Delay in presentation—Excuse.

Where at the time an appeal is presented the respondent is dead, the Court has power under S. 153, Civil Procedure Code, to allow the appellant to amend the cause-title by inserting the name of the respondent's legal representative. In such a case the Court should not dismiss the appeal as incompetent but should allow the amendment. But the appeal will be treated as presented against the legal representative on the date of the amendment, and any delay will have to be excused before the appeal can be heard. C. M. P. No. 2807 of 1923 (Ramesam and Wallace, JJ.) approved. *Govindu Kaviraj Purohito* v. *Gauranga Sahu*, (1923) 45 M L J 231 overruled.

Petition praying that in the circumstances stated therein the High Court will be pleased to direct the amendment of cause-title in S. A. No. 883 of 1923 on the file of the High Court by substituting the name of Adivi Lakshmana Rao in the place of Adivi Venkatramayya as the respondent therein

*C M P No. 2880 of 1923. 13th October, 1924.

F. B.

Gopala krishnayya v. Lakshmana Rao.

(A. S. No. 205 of 1921 on the file of the Court of the Subordinate Judge of Masulipatam).

The petition (C. M. P. No. 2880 of 1923) first came on before Mr. Justice Beasley sitting in the Admission Court on 26th August, 1924. His Lordship referred it to a Full Bench as in his opinion the decision of Ramesam and Wallace, JJ., in C. M. P. No. 2807 of 1923 (dated 10th October, 1923) was in direct conflict with the decision reported in *Govindu Kaviraj Purohito* v. *Gauranga Saw* (1).

The petition then came on before the Full Bench constituted as above on 13th October, 1924.

K. N. Rajagopala Sastri for *B. Satyanarayana* for petitioners.

The sole respondent in this case was alive when the Lower Appellate Court passed its decree but he was dead when the Second Appeal was filed in this Court. Neither the appellant nor his vakil was aware of that fact on that date. The present application was filed, after the fact of the respondent being dead was known to the appellant, for substituting the name of the respondent's son and legal representative as the respondent in the appeal. I merely want the correction to be made in the cause-title of the Second Appeal, the Second Appeal to be treated as presented against the legal representative on the date of the correction, and the delay in presentation on that assumption to be excused on proper cause shown. This can be done under S. 153, Civil Procedure Code. The term "proceeding" in that section is used in the sense of a document other than evidence. Compare the definition in S. 4 (12), our Original Side Rules, which says "Proceeding" includes all documents, other than documents produced as evidence, produced to, or filed in, Court by any party, etc. The S. A. memo is a "proceeding in a suit," because an appeal is merely a continuation of a suit. To hold otherwise would be to limit the powers under S. 153 only to trial Courts, which plainly is not the intention of the Legislature. The power to amend under S. 153 is not denied in *Govindu Kaviraj Purohito* v. *Gauranga Saw* (1) ; but it is there said that there is another course open to me. The other course suggested is filing another appeal. That is not really another course but a reduplication of proceedings already taken. I have to copy the memo. already filed,

1. (1923) 45 M L J 231.

F. B.

Gopala-krishnayya v. Lakshmana Rao.

and perhaps affix fresh Court-fee. The Court will not encourage unnecessary technicality and circuitousness. The amendment prayed for cannot prejudice the other side, for still there is the delay to be excused, which can be excused only for sufficient cause shown by me.

P. Bapiraju for respondent. The amendment cannot be granted. In *Veerappa Chetty* v. *Tindal Ponnen* (2) amendment was refused in the case of a suit against a dead man. (*The Court* : That was before the new Code, where S. 153 is newly inserted. There is no power under S. 5, Limitation Act, to excuse the delay in filing a suit.) That case was followed in *Arunachalam Chettiar, In re* (3) and in *Rasa Goundan* v. *Pichamuthu Pillai* (4) where it is said that the new Code makes no difference. (*The Court* : No reasons are given). *Veerappa Chetty* v. *Tindal Ponnen* (2) was also followed in *Bejoy Chand Mahatap Bahadur* v. *Amulya Charan Mitra* (5).

K. N. Rajagopal Sastri was not called on to reply.

The Court expressed the following

OPINION :—If an appeal is presented/against a person who was dead at the date of presentation, the Court may, under S. 153, Civil Procedure Code, permit the cause-title to be amended or may return the appeal memorandum for amendment and representation. We think that the Bench which decided *Govindu Kaviraj Purohito* v. *Gauranga Saw* (1) went too far in dismissing the second appeal as incompetent, and in declining to exercise its power of correcting errors under S. 153, Civil Procedure Code. If the appeal memorandum is not allowed to be amended the party may apply for a refund of the spoilt stamp and may present a fresh appeal. In any case, the Court will, if the appeal is out of time against the legal representative, have to excuse the delay in presentation before it can proceed to hear the appeal.

Although the appeal may be incompetent owing to the wrong person being named as respondent, the Court which deals with it is acting in a proceeding in a suit and as such has full power under S. 153 to direct an amendment of the appeal memorandum.

1. (1923) 45 M L J 231. 2. (1907) I L R 31 M 86 : 17 M L J 551.
3. (1915) 2 L W 828. 4. (1916) 42 I C 539. 5. (1914) 24 I C 112.

F. B.

Gopalakrishnayya v. Lakshmana Rao.

As observed by Ramesam and Wallace, JJ. in C. M. P. No. 2807 of 1923 the question resolves itself into one of Court-fees only, and if the party has only made an unintentional error in inserting the name of the wrong respondent in his appeal memorandum, there is no reason to make him pay Court-fees twice over, and it is simpler for the Court to direct an amendment of the cause-title.

The case will go back to the Admission Court with an expression of our opinion that the Court has power to amend the cause-title but that it is a matter for its discretion whether it should excuse the delay in presentation.

Costs of this reference will be costs in the second appeal.

T. S. V. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

Marudayya Thevar ... *Petitioner* (Petitioner in Cr. R. C. No. 239 of 1925 on the file of the High Court)*

v.

Shanmugasundara Thevar and another ... *Respondents (Respondents in do.).*

Marudayya Thevar v. Shanmugasundara Thevar.

Criminal Procedure Code, S. 145—Order under—Revision to High Court against—Receiver—Appointment of, pending disposal of petition—High Court—Jurisdiction.

The High Court has no jurisdiction to entertain a petition for the appointment of a Receiver pending the disposal of a criminal revision petition preferred against an order of the Lower Court passed under S. 145, Criminal Procedure Code.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to appoint a Receiver for the properties in dispute in Cr. R. C. No. 239 of 1925 presented to the High Court against the order of the Court of the Joint First Class Magistrate of Tinnevelly, dated 18th February, 1925, and made in M. C. No. 9 of 1925 pending disposal of the said criminal revision case.

Marthandam and *A. Srirangachari* for petitioner.

K. S. Jayarama Aiyar and *S. Nagaraja Aiyar* for respondents.

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*Cr M P No. 164 of 1925. 30th April, 1925.

Marudayya Thevar v. Shanmugasundara Thevar.

K. N. Ganapati for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER :—This is a petition asking this Court to appoint a Receiver pending disposal of Cr. R. C. No. 239 of 1925, which is a petition asking this Court to revise an order of the Lower Court passed under S. 145, Criminal Procedure Code.

Mr. Jayarama Aiyar for respondents raises a preliminary objection that this Court has no jurisdiction to entertain such a petition. We think the preliminary objection is well founded. If this Court has jurisdiction, it must be found within the Criminal Procedure Code [*see* the remarks of the learned Chief Justice in *Sankaralinga Mudaliar* v. *Narayana Mudaliar* (1)]. S. 561-A confers no new powers on this Court, since "the Court cannot, by invoking its inherent powers, extend the powers given to it by Statute" [Full Bench ruling in *Veerappa Naidu* v. *Avudayammal* (2)]. Petitioner relies on S. 423 (1) (*d*) read with S. 439, but an interlocutory order of the kind now sought by petitioner to be passed before the criminal revision case is heard is obviously not an order either incidental to or consequential on an order which has not yet been passed in the criminal revision case and which may eventually not be in petitioner's favour at all. It cannot be an order which necessarily follows from the order eventually passed in revision. The cases quoted by petitioner, *Reid* v. *Richardson* (3) and *The Katras-Jherriah Coal Co.* v. *Sibkrishta Daw and Co.* (4) have no bearing on this point.

It is next urged that the High Court must be deemed to possess all the powers which the Magistrate has in an enquiry under Chapter XII, Criminal Procedure Code. Such a general claim was considered in another connection by a Full Bench of this Court in *Veerappa Naidu* v. *Avudayammal* (2) and negatived. Even assuming for the sake of argument that the High Court has that power, it would not in the least avail petitioner. For, in the first place, the Magistrate and therefore, *ex hypothesi*, the High Court, can only appoint a Receiver while the enquiry is pending, and the enquiry is now over, and in the second place, the Magistrate, and therefore again the High Court, can appoint a Receiver only where it is satisfied that a dispute likely to cause a breach of the peace exists, whereas now the Magistrate's order has put respondent in posses-

1. (1922) I L R 45 M 913 : 43 M L J 369 (F B).
2. (1924) 48 M L J 106 (F B).
3. (1887) I L R 14 C 361.
4. (1894) I L R 22 C 297.

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sion of the property, and there is no danger of a breach of the peace, unless petitioner intends to defy the order of the Magistrate, and the High Court would certainly not encourage a party who announces his intention of doing so.

It is urged finally that, unless petitioner's prayer is granted, he will suffer much loss if he eventually succeeds in the criminal revision case. Obviously such a consideration does not confer on the High Court powers which it does not possess. In any case Criminal Courts are not primarily for the purpose of preventing private parties from sustaining pecuniary loss. Petitioner has his remedy in a civil claim for damages. We dismiss the petition.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

Kallukutti Parambath Perachan ... *Petitioner* (Respondent—Insolvent-debtor)*

v.

Puthen Peetikakkal Kuttiali ... *Respondent (Petitioner—One of the creditors).*

Kallukutti Parambath Perachan v. Puthen Peetikakkal Kuttiali.

Provincial Insolvency Act (V of 1920), S. 27—Adjudication—Order of, fixing time for applying for discharge—Jurisdiction—Insolvency petition filed under Act of 1907—Effect—Annulment of order of adjudication—Validity—Notice to all creditors—Absence of—Plea of invalidity of order on ground of—If can be taken by debtor-petitioner—Appellate order confirming order of annulment—Revision against—Appeal under S. 75 (1), proviso—Maintainability—S. 4 of new Act—Effect.

In a case in which the debtor presented an insolvency petition while the Provincial Insolvency Act of 1907 was in force, the petitioner was adjudicated an insolvent on the 4th of June, 1920. At the time of adjudication the Court fixed one year as the period within which he should apply for discharge, the order being obviously made under S. 27 of the new Act of 1920, which had come into force in the interval.

Held, that by filing the petition under the old Act the petitioner did not acquire a vested right to an unconditional order of discharge and that the Court had jurisdiction to impose a condition that discharge must be applied for within one year under S. 27 of the new Act.

What order should be passed on an insolvency petition is a matter of procedure.

The petitioner not having applied within the one year fixed, the District Munsif annulled the order of adjudication and the District Judge affirmed his order on appeal. On a revision petition filed against the order of the District Judge, *held,* (1) the revision petition was not competent as an appeal lay under

*C R P No. 1027 of 1923. 22nd April, 1925.

Kallukutti Parambath Perachan v. Puthen Peetikakkal Kuttiali.

S. 75 (1), proviso; and (2) it was not open to the petitioner to object to the order on the ground that it was made without notice to all the creditors.

Petition under S. 75 of the Provincial Insolvency Act (V of 1920) praying the High Court to revise the order of the District Court of South Malabar, dated 25th October, 1923, in C. M. A. No. 62 of 1923, preferred against the order of the Court of the Principal District Munsif of Calicut, dated 31st July, 1923, in I. P. No. 1 of 1920 (Miscellaneous Petition No. 582 of 1923).

N. A. Krishna Aiyar for petitioner.

T. S. Viswanatha Aiyar for respondent.

The Court delivered the following

JUDGMENT :—In this case the insolvency petition was put in on the 8th January, 1920, and the petitioner was adjudicated an insolvent on the 4th of June, 1920. Meanwhile, Act V of 1920 had come into force on the 25th of February, 1920. At the time of adjudication the Court fixed one year as the period within which he should apply for discharge. This order was based obviously under S. 27 of Act V of 1920 as the old Act III of 1907 contained no such provision. He not having applied within one year the District Munsif of Calicut annulled the order of adjudication and the District Judge of South Malabar affirmed the order on appeal. The present revision petition before me is against the order of the District Judge.

It has been contended before me that as the petition was filed under the old Act the petitioner obtained a vested right to an unconditional order of discharge and the District Munsif's Court had no jurisdiction to impose a condition that discharge must be applied for within one year under S. 27 of the new Act. It is true that in *Chhatrapat Singh Dugar* v. *Kharag Singh Lachmiram* (1) the Privy Council held that where an application under the Insolvency Act complies with all the conditions specified by the Act the petitioner is entitled to an order of adjudication and the dismissal of his petition amounted to an abuse of the process of Court. But I do not see how this decision helps the petitioner. For some reason or other the petition did not come on for final disposal before the 25th of February and by the time it did so come on, the new Act had come into force. What order should be passed on the insolvency petition seems

1. (1916) I L R 44 C 535 : 32 M L J 1 (P C).

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to me to be a matter of procedure and it cannot be said that by the mere filing of a petition under the old Act the petitioner acquired a vested right to a particular kind of order which cannot be affected by the new Act. The order actually passed was a perfectly proper order under the new Act. It may be that if a condition was improperly annexed it may be ignored as a nullity [vide *Ram Chandra* v. *Syama Charan* (2)] but I do not see any way to hold in this case that the condition was improperly annexed or was passed without jurisdiction. I do not see how the remarks of Macleod, C.J. in *Laxmi Bank, Ltd. Poona* v. *Ram Chandra* (3) help the petitioner. All that was said in that case was there was no material difference between Act III of 1907 and the Act of 1920 in the matter of what was required to be proved before it is decided that the petitioner had a right to present his petition. Nor does the decision in *Aiyapparaju* v. *Venkatakrishnayya* (4) help the petitioner. It is not decided in that case that when a petition was filed under the old Act and when the new Act had come into force by the time the petition comes on for disposal the old Act is applicable and not the new Act. What was held there was that a creditor's right to apply for adjudicating his debtor an insolvent based on an alleged fraudulent transfer by the debtor had become barred under the old Act and therefore that the new Act could not revive the barred right and the District Court had no power under S. 78 of Act V of 1920 to excuse the delay so as to revive the barred right. This proceeds on a well-known and perfectly intelligible principle that a new Act cannot revive a right barred under an old Act. This decision does not therefore help the petitioner. See also *Hanmayya* v. *Ramayya* (5). My conclusion is in accordance with the decision in *S. Rangiah Chetti* v. *Annasami Alwar Aiyangar* (6) where it is observed that any orders passed under the old Act or rights obtained thereunder will be unaffected by the new Act. In the present case we have neither.

A second point raised by the petitioner is that the adjudication should not be annulled without notice to all the creditors and he relied on a decision in *In the matter of Rajnarayan Pal* (7). In that case the petition for annulment was filed on the ground that the insolvent had come to a settlement with all their creditors and objection was properly taken for the

2. (1913) 19 C L J 83.
3. (1921) I L R 46 B 757 at 760.
4. (1922) 44 M L J 303.
5. (1921) 41 M L J 126.
6. (1922) 18 L W 836.
7. (1874) 13 Ben L R App 25.

Kallukutti Parambath Perachan v. Puthen Peetikakkal Kuttiali.

Official Assignee that notice should be given to all the creditors having regard to the nature of the ground but I do not see how that decision applies here. Even if it does, it is for the creditors to complain. They have not chosen to appear and oppose the annulment in all the three Courts. I take it they are apparently satisfied with the annulment. Anyhow I do not see how this objection can be taken by the petitioner. I may add that a preliminary objection was taken that the revision petition does not lie as an appeal lies under S. 75 (1) proviso. As I have come to a conclusion against the petitioner on the merits it may not be necessary to deal with this objection, but I think the objection is well founded. The words "of any nature whatsoever" in S. 4 of the new Act shows that all questions which arise in the course of insolvency may be dealt with by the Court for the purpose of doing complete justice and in such a case a Second Appeal lies to the High Court on a question of law. It, therefore, seems to me that the revision petition is not competent.

The result is the petition is dismissed with costs.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE WALLACE.

Vodde Subbigadu ... *Appellant** (*Prisoner*).

Vodde Subbigadu, *In re.*

Penal Code, S. 84—Insanity preventing accused from understanding nature of crime—Proof of—Evidence—Absence of sane motive for crime if—Sanity at time of trial—Evidence of—Effect—Criminal Procedure Code, Ss. 470, 471—Order to be passed under, in a case to which S. 84, Indian Penal Code, applies.

Held, on the evidence, that, at the time when the accused committed the crimes of which he was convicted by the Sessions Judge, he was by reason of unsoundness of mind incapable of knowing the nature of his acts or that what he was doing was wrong or contrary to law, and that the accused was therefore entitled to rely upon S. 84, Indian Penal Code, and be excused for the acts he had done.

The fact that there was no sane motive at all for the crime is one of the indicia of the act being done by some kind of insane impulse.

The fact that the accused was not insane at the time of the trial is of no importance for the purpose of deciding whether at the time the crimes were committed the accused was insane or not.

Proper order to be passed under S. 471 of Criminal Procedure Code in a case to which S. 84, Indian Penal Code, applies.

Appeal against the order of the Court of Session of the Anantapur Division in Case No. 68 of the Calendar for 1924.

*Cr Appeal No. 99 of 1925. 22nd April, 1925.

The Public Prosecutor (*J. C. Adam*) for the Crown.

The judgment of the Court was delivered by

Krishnan, J.

Krishnan, J. :—In this case the accused Vodde Subbigadu has been convicted by the Sessions Judge of Anantapur under S. 302, Indian Penal Code, for the murder of one Vodde Madduleti and also under S. 325, Indian Penal Code, for causing grievous hurt to Madduleti's wife Venkatamma on the evening of the 21st February, 1924. In so doing the Sessions Judge rejected a plea of insanity which was put forward on behalf of the accused. The plea was not that he was insane at the time of the hearing but that he was insane at the time when the occurrence took place. On the evidence in the case which has been set out by the learned Sessions Judge and discussed by him carefully there can be no doubt that the accused did cause the death of Madduleti and also caused grievous hurt to his wife as the prosecution witnesses have deposed. It would seem that on the day in question the accused went to the place where Vodde Madduleti and his wife and some of the prosecution witnesses were working and asked for a drink of water. He was given a drink of water after some parleying by Venkatamma. He then seems to have sat at the place and behaved in a somewhat extraordinary manner muttering to himself for quite a long time. He seems to have been saying " Swami Narayanamurthi ! that man spoiled me, this man spoiled me ". In the evening after Madduleti and Venkatamma had finished their work and were returning home the accused seems to have gone behind Madduleti with two stones in his hand and to have attacked him and struck him on the head with those stones and inflicted serious wounds on him. Madduleti fell down when his wife ran up. She was also given a blow by the accused with the mud pot which she had on her head. She also fell down and lost her consciousness. These people were found subsequently by some witnesses and taken to the hospital but Madduleti died as the result of the wounds inflicted on him as soon as he reached the hospital. The woman suffered for some time but has recovered and is now examined as P. W. 9. Her evidence is corroborated as far as possible by the evidence of witnesses who were working with her that day, P. Ws. 10, 11 and 12. There is no reason to doubt the truth of P. W. 9's evidence in the case. We therefore agree with the Sessions Judge in finding that the accused did commit the crimes with which he is charged. But the important question in this case is whether

Vodde Subbigadu, *In re.*

Krishnan, J.

the accused is entitled to rely upon S. 84 of the Indian Penal Code and be excused for the acts he had done because at the time he did them he was by reason of unsoundness of mind incapable of knowing the nature of his acts or that what he was doing was wrong or contrary to law. The learned Sessions Judge has discussed the question at some length but has taken a somewhat severe view of the matter. He has held that it is not proved that the accused was incapable of understanding the nature of the acts which he committed. After looking into the evidence carefully we are inclined to think that that is not a correct view. It would seem from all the circumstances of the case that at the time when he attacked the deceased and his wife he was really suffering from an impulse of homicidal mania and it was probably as the result of it he committed these offences. In the first place as the learned Judge himself remarks there is no kind of motive for the crime, or as stated in *Queen-Empress v. Kadar Nasyer Shah* (1), no apparent sane motive at all is alleged. That of course is one of the indicia of the act being done by some kind of insane impulse. The accused was behaving, as stated already, in an extraordinary manner just before the offence was committed. He was seated under a babul tree and was muttering something unintelligible, of somebody having spoiled him. The learned Sessions Judge seems to think that his action showed a certain amount of deliberation and calculation. We do not think there is any evidence to show it except that he did not at once attack the deceased in the middle of the day. There is nothing to show deliberation at all. In fact the evidence is merely that he attacked them in the afternoon. There is no evidence to show that he actually followed them or how he came across them in the evening when he did attack. No doubt he took two stones in his hand but that, we think, is of no importance either way. It was not impossible that in the insane condition of his mind he thought that the deceased was one of the men who had spoiled him. We do not know anything more of the man's conduct at the time to draw any definite inference against the view we are taking. The learned Sessions Judge says he lay in wait in the open space near the house of P. W. 11 and followed P. W. 9 and her husband so as to attack them when they were by themselves. We do not think there is sufficient warrant for this inference from the evidence.

1. (1896) I L R 23 C 604 at 609.

Vodde Subbigadu, *In re.*

Krishnan, J.

The accused was examined by the Assistant Surgeon, Mr. K. Govinda Menon, P. W. 8, about three weeks after this occurrence and his evidence is perfectly clear that the man was suffering from insanity at the time when he was under observation by him. Mr. Govinda Menon seems to have placed him under observation very soon after the occurrence, *i. e.*, within three weeks of it and he gives his opinion that even before three weeks he would have been of unsound mind. It is true that the Head Constable, P. W. 6, who arrested him the next day says he was all right when he arrested him but he goes on to say that all the people of the village told him that the accused had become mad, and that juice was poured in his nostrils and that he had got no better. Taking all these circumstances into consideration and the fact that he seems to have acted altogether unaccountably, we think the inference is fairly strong that he acted when he committed these crimes in a fit of insanity without understanding what the real nature of the act he was doing was. The fact that long afterwards, when he was placed under the observation of the District Medical Officer, that officer did not discover any signs of insanity and thought he was of sound mind is not of much importance, because by that time the symptoms of insanity had passed off. The evidence of that Medical Officer is important only in connection with the trial. That evidence shows clearly that the man was not insane at the time of the trial and therefore the trial was good. But it is of no importance for the purpose of deciding whether at the time these crimes were committed the accused was insane or not. The Public Prosecutor supports the case of the accused before us. We have therefore come to the conclusion that the proper inference in the case is that S. 84 applies to the accused and that he should be acquitted under that section of the offences charged against him ; and we accordingly set aside the conviction and sentence against him.

The next question is, what orders are we to pass in the case ? Ss. 470 and 471 of the Criminal Procedure Code apply to the case. Under S. 471 we are required to say specifically whether the accused committed the act or not. We record a finding that he did commit the acts charged against him namely, he caused the death, by beating with a stone on the head of Madduleti, and he also caused grievous hurt to his wife Venkatamma. Under S. 471 we think the proper order to pass in this case is to direct that the accused be detained in safe-custody in the Bellary Central Jail in which he is at present. He

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Krishnan, J.

will be detained there not as a convict but in safe custody as required by S. 471. As he is not at present suffering from insanity we think it is better to keep him in jail rather than ourselves send him to the Lunatic Asylum. The papers will be sent to the Government with a report of the action we have taken under S. 471. It will be for the authorities concerned to take further action under S. 474 when it is thought necessary to do so.

A. S. V. *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Periakaruppa Thevan and others ... *Appellants** (*Defts.*)

v.

Aiyanarsand Kaniyalaswamigal Kovil Devasthanam of Koshadai and Virathipathu Villages, Madura Taluq, through its Dharmakarthas and Pooja Miras holders and others ... *Respondents in all* (*Plaintiffs* 1 *to* 13, 15 *to* 22, 24 *to* 28, 31 *to* 33).

Periakaruppa Thevan *v.* Aiyanarsand Kaniyalaswamigal Kovil Devasthanam.

Landlord and tenant—Minor inamdars—Suit to eject their tenants—Onus of proof on plaintiffs—No presumption that plaintiffs own both warams—Occupancy rights of tenants—Proof of—Quantum.

In a suit by the plaintiffs, minor inamdars, to evict the defendants, who were cultivating their inam lands, *held,* that there was no presumption that the plaintiffs were owners of both warams, and that, on the ordinary principle that a person suing in ejectment must prove his right to eject, the onus lay on the plaintiffs of proving that they owned the kudiwaram.

It appeared that the defendants and their predecessors-in-interest had been in possession of the suit lands at any rate from 1843 onwards and that they had been disposing of their rights in those lands and dealing with them as if they had the right of occupancy in the lands. There was no evidence to show that the original grantee was himself in occupation of the suit lands before the grant (which was prior to the British Rule) and the only available evidence as to the tenants in possession showed that, so far back as there was any record, the defendants and their predecessors had been cultivating the lands and dealing with them as if they had the right of occupancy.

Held further, that the plaintiffs had not proved their right to eject.

Second Appeal against the decrees of the Court of the 2nd Additional Subordinate Judge of Madura in A. S. Nos 21, 22, 23, 25 and 154 of 1921 preferred against the decrees of

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*S A Nos. 1454, 1455, 1456, 1457 and 1476 of 1922. 16th April, 1925.

Periakaruppa Thevan v. Aiyanarsand Kaniyalaswamigal Kovil Devasthanam.

the Court of the District Munsif of Melur at Madura in O. S. Nos. 445, 446, 447, 449 of 1917 and 502 of 1919 respectively.

C. S. Venkatachariar for appellants.

A. V. Viswanatha Sastri and *K. Rajah Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—In these appeals the question at issue is whether the plaintiffs, minor inamdars, are entitled to evict the defendants who are cultivating their inam lands.

The Lower Appellate Court has found that the tenants have not proved their occupancy right, and that they have not subsequently acquired the right of occupancy ; and has accordingly decreed the suits in favour of the plaintiffs.

In these appeals it is contended that the Lower Appellate Court has not considered the decision of the Privy Council in *Sivaprakasa Pandara Sannadhi* v. *Veeramma Reddi* (1). In that case it was finally laid down that in considering the nature of an inam grant, namely whether it was a grant of the *melvaram* only or a grant of both *melvaram* and *kudivaram,* no presumption can be made in favour either of the grantee or of the cultivator. For a long period this Court had held that there was a presumption, especially in the case of Brahmins, that the grant was only of the *melvaram*. This presumption was held to be wrong by the Privy Council in *Venkata Sastrulu* v. *Seetharamudu* (2), which says that each case must be considered on its own facts. Subsequent to that decision a Full Bench of this Court in *Muthu Goundan* v. *Perumal Aiyan* (3) held that there was an initial presumption in favour of the grant of both varams. In *Sivaprakasa Pandara Sannadhi* v. *Veeramma Reddi* (1) this judgment has been referred to. It is pointed out by the learned Judges that the Full Bench decision is clearly in error and that there is no presumption one way or the other. In the present case therefore it would appear that in the absence of any presumption that plaintiffs own the *kudivaram* it is incumbent on them to prove such right, which must be invoked to support their claim to eject defendants. The ordinary principle that a person suing in ejectment must prove his right to eject will apply. The learned Subordinate Judge has started his judgment with an assumption "that the burden is on the cultivating tenants to show that they and their predecessors-in-title have been in occupation of the identical lands from the

1. (1922) I L R 45 M 586 . 43 M L J 640 (P C).
2. (1919) I L R 43 M 166 : 37 M L J 42 (P C).
3. (1921) I L R 44 M 588 : 40 M L J 429 (F B).

Periakaruppa Thevan v. Aiyanarsand Kaniyalaswamigal Kovil Devasthanam.

date anterior to the grant." Admittedly the grants to the plaintiffs' predecessors were prior to the British rule and it would be extremely difficult for the defendants to prove that at the time of the grants their predecessors were actually in possession of the lands. It seems to me therefore that on the authority of *Sivaprakasa Pandara Sannadhi* v. *Veeramma Reddi* (1) the burden in the present suits is on the plaintiffs to prove their right to eject.

It is, however, contended for the respondents that this principle laid down by the Privy Council in 1922 has been modified in 1923 by the judgment in *Nainapillai Marakayar* v. *Ramanadhan Chettiar* (4) in which it is stated :—

"It cannot now be doubted that when a tenant of lands in India, in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant."

It is contended that by reason of this dictum the burden is upon the defendants to prove their occupancy rights. The decision in *Nainapillai Marakayar* v. *Ramanadhan Chettiar* (4) is based upon two prior cases *The Secretary of State for India in Council* v. *Luchmeswar Singh* (5) and *Sethuratnam Aiyar* v. *Venkatachala Goundan* (6). In both these cases it was either admitted, or found as a fact, that the tenants had been let into possession by the landlord and that consequently when the tenant claimed to possess occupancy right, it was incumbent upon him to prove it. I think that the same principle has been repeated in *Nainapillai Marakayar* v. *Ramanadhan Chettiar* (4). That case does not in any way modify the judgment of their Lordships delivered in the preceding year. In *Nainapillai Marakayar* v. *Ramanadhan Chettiar* (4) it is stated that the 'lands' in respect of which a decree of ejectment has been made are part of the endowed property of the temple and that it is not disputed that the defendants were 'tenants' of the temple lands to which the suits relate. It had been definitely found by the Subordinate Judge that the plaintiffs had both varams in the lands and consequently it was incumbent on the defendants to prove their occupancy right. If one were to interpret the judgment otherwise, it would appear that *Sivaprakasa Pandara Sannadhi* v. *Veeramma Reddi* (1) and *Nainapillai Marakayar* v. *Ramanadhan Chettiar* (4) are in con-

1. (1922) I L R 45 M 586 : 43 M L J 640 (P C).
4. (1923) I L R 47 M 337 : 46 M L J 546 (P C).
5. (1888) I L R 16 C 223 (P C).
6. (1919) I L R 43 M 567 : 38 M L J 476 (P C).

Peria-karuppa Thevan v. Aiyanar and Kaniyala-swamigal Kovil Devasthanam.

flict, and, inasmuch as the judgment in the former is not referred to in the latter, I do not think that any such inference can be drawn if the cases can be explained in any other manner. As I have said above, the latter case follows two prior cases in which the land itself belonged to the plaintiff, and consequently I think that in this last case also it must be deemed that the judgment is based on such an assumption. If I am correct in this, the present suits have to be determined in accordance with the principle laid down in *Sivaprakasa Pandara Sannadhi* v. *Veeramma Reddi* (1), and that is, that there is no presumption that the grantee of an inam is holder of both varams. In this view it might be advisable to set aside the finding of the Subordinate Judge and ask for another finding; but inasmuch as the facts are all before me, I do not think it is necessary. The District Munsif has dealt with the defendants' evidence at considerable length and has found that the defendants and their predecessors-in-interest have been in possession of the suit lands at any rate from 1843 onwards and that they have been disposing of their rights in those lands and dealing with them as if they had this right of occupancy. There is not a particle of evidence to show that the original grantee was himself in occupation of the suit lands before the grant and the only available evidence as to the tenants in possession shows that so far back as there is any record, the defendants and their predecessors have been cultivating the lands and dealing with them as if they had this right of occupancy. The learned Subordinate Judge has not referred to any particular facts in favour of the plaintiffs beyond reciting the history of land tenures in this Presidency and, although that history is not inconsistent with the grant of the actual land to plaintiffs, it does not support such a grant to any greater extent than a grant of *melvaram* only. Each case has to be determined on the evidence given therein. In the present case the District Munsif is right in holding that the plaintiffs have not proved their right to eject.

The Lower Appellate Court's decrees are therefore set aside and the decree of the District Munsif restored with costs both here and in the Lower Appellate Court.

A. S. V. *Appellate Court's Decrees set aside and the Munsif's restored.*

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1. (1922) I L R 45 M 586 : 43 M L J 640 (P C).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice*, MR. JUSTICE PHILLIPS AND MR. JUSTICE KUMARASWAMI SASTRI.

S. Gopala Aiyangar and another ... *Petitioners** (*Petitioners*)

v.

M. K. Mahomed Ibrahim Rowther and others... *Respondents* (*Respondents*).

Gopala Aiyangar v. Mahomed Ibrahim Rowther.

Madras District Municipalities Act of 1920—R. 12 of Election Rules—Effect—Candidate obtaining majority of votes disqualified from sitting—Procedure on—Declaration that candidate who secured next highest number of votes was duly elected—Fresh election—Order for—Voters aware of disqualification—Voters having no knowledge of disqualification—Distinction.

If a voter throws away a vote by ignoring something which he could have known and which would have told him that he was throwing away his vote because he was giving it for a person who could never succeed in the election, then his vote has to be taken as wiped out of the election and if there are enough of such votes to destroy the majority, the man who has the next highest number of votes can be declared duly elected ; but, if the votes were given in ignorance of the disqualification under which the candidate of his choice was in fact labouring, then it would be inequitable to allow the votes to be thrown away for that reason and the only proper course is to order a fresh election.

R. 12 of the rules for the decision of disputes as to the validity of an election does not mean that if the seat was claimed by the candidate who secured the next highest number of votes, the Judge must declare him duly elected, and that the option of ordering a second election only applies to cases where such candidate does not claim the seat.

Petitions under S. 115 of Act V of 1908 (by the petitioners and 2nd respondent in the Lower Court) praying the High Court to revise the orders dated 28th November, 1923, of the District Court of Trichinopoly in O. P. No. 138 of 1923.

D. Ramaswami Aiyangar for *C. S. Venkatachariar* for petitioners.

T. V. Ramanatha Aiyar for respondents.

A. Krishnaswami Aiyar (*amicus curiae*) for respondent.

The Court delivered the following

JUDGMENT :—In this case the candidate who obtained the greatest number of votes at the election was unseated on the ground that he was interested in a Municipal contract and that therefore he was disqualified from sitting. The petitioner claimed the seat but he did not allege that the disqualification under which the successful candidate was ultimately found to labour was known to all or any of the voters who cast their votes for him. The first argument on behalf of the 2nd res-

*C R P Nos. 115 and 568 of 1924. 11th February, 1925.

pondent was that R. 12 of the rules for the decision of disputes as to the validity of an election means that if the seat was claimed by the petitioner, the Judge must declare him duly elected and that the option of ordering a second election only applies to cases where the petitioner did not claim the seat. That seems to us a quite untenable view and we do not think that the draftsman of these rules—and it is a matter of common knowledge that both the District Municipalities Act (V of 1920) and the rules drawn under it were very largely based on English precedents and English decisions—could have meant to overlook the fundamental principles which have governed English Electoral Courts for many years. The principles appear to be these and we cannot put them better than they were put in the argument of Mr. Corrie Grant in *Hobbs* v. *Morey* (1). He says, "The principle of election law is that when there has been an election the candidate who is declared to be elected must be shown to have the majority of votes." This *prima facie* requirement of the law is subject to a modification. He goes on "If, however, a candidate is disqualified by status, as in the case of a woman or a felon, the votes given for that candidate will be held to have been thrown away and the opposing candidate, although in fact he has received a less number of votes, will be declared to be elected." That was the argument which was accepted by the learned Judges and on which Mr. Justice Kennedy's judgment is based. There are several authorities which we need not trouble to go into. The effect of those authorities is that, if a voter throws away a vote by ignoring something which he could have known and which would have told him that he was throwing away his vote because he was giving it for a person who could never succeed in the election, then his vote has to be taken as wiped out of the election and if there are enough of such votes to destroy the majority, the man who has the next highest number of votes can be declared duly elected; but, if the votes were given in ignorance of the disqualification under which the candidate of his choice was in fact labouring, then it would be inequitable to allow the votes to be thrown way for that reason and the only proper course is to order a fresh election. There is a passage in the judgment of Kennedy, J. which is relied upon to show that in this case it would be a suitable course to have a further inquiry to see whether the second respondent can bring himself within the words of the learned Judge. Those

1. (1904) 1 K B 74.

Gopala Aiyangar v. Mahomed Ibrahim Rowther.

words are these. He sets out the principle that the disqualification should be apparent and says : "As here the disqualification was not apparent and the petition does not allege that the voters knew of the respondent's disqualification (the only notices being notices to the Mayor and to the opposing candidate), and the petitioner had only a minority of votes, I do not think he can successfully claim the seat."

We respectfully accept the view put forward by Kennedy, J. as accurate though we see the very inconvenient consequence that might arise if such an inquiry as is outlined were ever ordered. But as there is here no allegation of knowledge of the disqualification on the part of the persons who voted for the unseated candidate, we agree that the proper course is the one suggested by the learned Judge and there is no cause to interfere. Both the petitions are dismissed.

A. S. V. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

Lakshmi Ammal ... *Appellant* (Plaintiff).*

Lakshmi Ammal, *In re.*

Court Fees Act, S. 12, cls. 1 and 2—Plaint—Deficiency in Court-fee paid on—Power of Appellate Court to demand—Plaint accepted by Chief Ministerial Officer entrusted with duty of receiving plaints and of seeing that proper fee is paid thereon—No actual decision by Lower Court on question of Court-fee—Effect—Sale deed—Suit by vendee to set aside, and to recover portion of purchase money paid under it with damages—Court-fee on plaint in.

A plaint, which was insufficiently stamped, was filed in the City Civil Court, and was accepted without objection by the Sheristadar of that Court, the Chief Ministerial Officer of that Court entrusted with the duty of checking the pleadings filed in that Court and of seeing whether the proper Court-fee had been paid thereon. The suit was dismissed by the City Civil Judge, and, on appeal by the plaintiff, the Taxing Officer of the High Court demanded from the plaintiff the difference between the Court-fee paid by her in the City Civil Court and the Court-fee payable by her according to law. The plaintiff contended that, as there was no decision by the City Civil Judge under S. 12 of the Court Fees Act as to the proper Court-fee payable on the plaint, the Appellate Court had no power under S. 12 (2) of that Act to require her to pay the additional Court-fee.

Held, overruling the contention, that the act of the Sheristadar in accepting the plaint amounted to a decision by the City Civil Judge as to the Court-fee payable on the plaint under S. 12 (1) of the Court Fees Act, and that the Taxing Officer was therefore entitled, under S. 12 (2) of that Act, to insist upon the payment of the difference.

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*S R No. 12829 of 1924. 29th April, 1925.

Lakshmi Ammal, *In re.*

The words "shall be decided by the Court" in S. 12 (1) do not mean that an issue shall be raised and decided by the Court. All that they mean is that the Court, either the presiding officer, or the ministerial officer who is charged with that duty, has to determine what the Court-fee is.

The appellant purchased some property for Rs 2,000 under a sale deed executed by the defendant and paid him Rs. 1,000 in cash and executed in favour of the defendant and his minor sons a mortgage deed for the balance of consideration for the sale. In a suit brought by her (appellant) alleging that the defendant had played a fraud on her by suppressing important facts and praying for a declaration that the sale deed and the mortgage deed were invalid and for the return of the Rs 1,000 paid by her and for Rs. 300 as damages, *held,* that the substantial relief asked for by the plaintiff was the cancellation of the sale deed, the claim for money being only ancillary to it, and that Court-fee on Rs. 2,300 should be paid by her.

The property having actually passed by the sale deed from the defendant to the plaintiff, she could not claim the amount paid by her without setting aside the sale.

Appeal sought to be preferred against the decree of the City Civil Court, Madras, in O. S. No. 512 of 1922.

W. V. Rangaswami Aiyangar for appellant.

The Government Pleader on behalf of the Government.

The Court made the following

ORDER :—*Devadoss, J.* :—The appellant purchased some property for Rs. 2,300 under a sale deed executed by the defendant and paid him Rs. 1,000 in cash and executed in favour of the defendant and his minor sons a mortgage deed for the balance of consideration for the sale. She brought a suit in the City Civil Court against the defendant alleging that the defendant had played a fraud on her by suppressing important facts and praying for a declaration that the sale deed and the mortgage deed were invalid and for the return of the Rs. 1,000 paid by her and for Rs. 300 as damages. The City Civil Judge dismissed the plaintiff's suit and the plaintiff preferred this appeal to the High Court. She paid the Court-fee on Rs. 1,300 being the amount claimed by her from the defendant. The Taxing Officer of this Court held that the Court-fee paid was insufficient and that the Court-fee on Rs. 2,300 should be paid on the ground that the substantial relief asked for by the plaintiff was the cancellation of the sale deed. The appellant paid the additional Court-fee. The Taxing Officer further demanded the difference between the Court-fee paid by her in the City Civil Court and the Court-fee payable by her according to his view. The appellant's vakil objected to paying this difference and hence the reference to this Court. (Devadoss, J.)

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—
Devadoss, J.

This being a matter of considerable importance, we gave notice to the Government Pleader to appear on behalf of the Government. The first contention raised by Mr. Rangaswami Aiyangar, the appellant's vakil, is that there was no decision by the City Civil Judge under S. 12 of the Court Fees Act as to the proper Court-fee payable on the plaint and that only in cases where there is a decision by the Lower Court the Appellate Court has power under S. 12, cl. 2, to require a party to pay the additional Court-fee which the Appellate Court may consider to be the proper fee payable on the plaint. The contention amounts to this : that when a plaint is received and filed by the Court without the presiding officer of the Court giving his decision as to the amount of the proper Court-fee payable, there is no decision of the Court under S. 12. In order to be certain as to the practice prevailing in the City Civil Court we called for a report from the City Civil Judge. The learned Judge reports :

"The principal ministerial officer attached to this Court, *viz.*, the Sheristadar himself, personally receives all plaints and affixes the date stamp on them as soon as they are received. He then goes through the plaints and scrutinizes them carefully to ascertain whether they have been presented in time and whether they have been properly framed or stamped............ .... It is only in cases where the principal ministerial officer feels any doubt and puts up the cases for formal orders by the Judge that the Judge applies himself to the question and gives his personal decision. This is the uniform course of proceeding that has been adopted during my time and I understand during the time of my predecessors as well."

So far as we are aware this is the practice obtaining in all mofussil Courts. Plaints and petitions are received by the chief ministerial officer who files them if he is satisfied that they are properly stamped. If he finds that they are not properly stamped, he draws the attention of the pleader concerned to the fact and the deficiency is made up. If there is a difference of opinion between the chief ministerial officer and the pleader concerned, the matter is placed before the Judge or the presiding officer of the Court who decides what the proper Court-fee is. If objection is taken by the opposite side as to the correctness of the valuation, or Court-fee, an issue is raised as regards that, and the Court decides what the proper valuation is and what Court-fee should be paid. The construction contended for by Mr. Rangaswami Aiyangar is not supported by the wording of S. 12. S. 12 (1) is in these terms :—

"Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum

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or appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit."

He placed reliance upon the words " shall be decided by the Court." This does not mean that an issue shall be raised and decided by the Court. All that it means is that the Court, either the presiding officer or the ministerial officer who is charged with that duty, has to determine what the Court-fee is. Where the chief ministerial officer's decision is demurred to, the Judge or the presiding officer decides in open Court after hearing the party concerned or his pleader, what the proper Court-fee is. It cannot be said that when the ministerial officer, whose duty it is to check the pleadings filed in Court and whose duty it is to see whether proper Court-fee is paid or not, decides what the proper fee is, his decision is not a decision of the Court. Mr. Rangaswami Aiyangar places reliance upon the decision in *Kala Chand Sen* v. *Anund Kristo Bose* (1) in support of his contention. In that case the plaintiff paid a certain Court-fee on his plaint. The suit was decreed in favour of the plaintiff. The defendant appealed and paid the same Court-fee on his Memorandum of Appeal as was paid by the plaintiff on his plaint. When the appeal came on for hearing, the appellant raised the objection that the proper Court-fee was not paid on the plaint and therefore the plaint ought to have been rejected. The Subordinate Judge took the extraordinary course of requiring both the appellant and the respondent to pay deficient stamp duty, and on the failure of both to do so, he ordered both the plaintiff's suit and the appeal to be dismissed. The plaintiff preferred a special appeal to the High Court. The High Court set aside the order of the Subordinate Judge as it practically amounted to allowing the appeal inasmuch as he dismissed the plaintiff's suit. In the course of the judgment the learned Judges observe :—

"It seems to us, therefore, that the Subordinate Judge ought not to have allowed to be raised on this occasion a question which neither had been raised in the first Court where, if necessary, the amount of additional stamp might have been at once paid, nor in the grounds of appeal."

The question raised here was not specifically raised there. Considering the course that the case took, the learned Judges thought that the defendant was in a way estopped from raising the question of Court-fee, inasmuch as he himself paid the

1. (1874) 22 W R 435.

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same Court-fee on his appeal as was paid by the plaintiff on his plaint, and the order of the Subordinate Judge practically amounted to allowing the appeal which he could not have done when he found that the proper Court-fee was not paid for the appeal. In *Shajan Bibi* v. *Earsin Dewan* (2) the question before us was not specifically raised. There the question was whether the suit was properly valued under the Suits Valuation Act and the High Court held that any objection as to valuation should have been raised in the Court of first instance as required by S. 11 of Act VII of 1887 (Suits Valuation Act). In that case the Lower Appellate Court raised the question *suo motu* when it was not taken either in the Court of first instance or in the memorandum of appeal. The Lower Appellate Court held that the suit was not properly valued and directed the plaint to be returned to the Court of first instance as insufficiently stamped. The valuation of the appeal was the same as that in the first Court. The learned Judges observe at page 47 :—

"Without, therefore, expressing any opinion on the merits of the case, we hold that the learned Judge was not, in law, entitled to raise the objection and to decree the appeal on that ground."

These two cases have no application to the present case. In the present case the question is whether the Court of Appeal, when admitting an appeal, is entitled to demand under the provisions of S. 12, cl. 2, proper Court-fee payable in this Court as well as in the Court below by reason of the Judges in the Court below not having given a decision as to the proper amount of the Court-fee.

Our attention is drawn by the learned Government Pleader to the case in *Shama Soondary* v. *Hurro Soondary* (3). In that case the District Judge on appeal held that before he could go into the merits of the case, he must, under S. 12 of Act VII of 1870, require the plaintiff to pay any such additional amount as would make up the fee payable on the suit. The High Court upheld the decision of the District Judge. There the learned Judges declined to follow the ruling in *Kala Chand Sen* v. *Anund Kristo Bose* (1) holding that the expression of opinion relating to S. 12 of the Court Fees Act was an *obiter dictum*, and could not be regarded as an authoritative declaration of law. They observe at page 351 :—

"No plaint can be accepted and registered until these preliminary questions of valuation and sufficiency of stamp have been determined by the Court,

1. (1874) 22 W R 435. 2. (1912) 16 I C 46. 3. (1881) I L R 7 C 348.

and therefore it seems to us that it would be straining the language of S. 12 to say that the question relating to valuation therein mentioned has only reference to a question raised as a distinct issue, and decided by the Court of first instance in the presence of, and as between, the parties to the suit."

It follows that where the Court accepts the plaint as properly valued, it must be taken that the Court has given its decision that the proper Court-fee has been paid. So long as the Court acts upon the footing that the proper Court-fee has been paid, its act amounts to a decision under S. 12, cl. 1 of the Court Fees Act. If the Court is not satisfied that the proper Court-fee has been paid, it certainly would have insisted upon the proper Court-fee being paid. Where it receives plaint, petition, or other pleading, as properly stamped, its act must be taken to fulfil the requirements of S. 12, cl. 1. This view is supported by the observations of Carnduff, J., in *Surendranath* v. *Sitanath Das* (4). The learned Judge observes at page 944 :—

"It is true that there is on the record of this case no express decision that the fee of Rs. 7-8-0 was sufficient ; but it seems to me that such a decision is implied by the action of the Court in receiving the application on a stamp of Rs 7-8-0 and passing any order upon the prayer contained in it."

We hold that when a Court receives a plaint, petition, or any other pleading and files it as properly stamped, its act amounts to a decision that the proper Court-fee has been paid. If according to the practice prevailing in the Courts the chief ministerial officer files a plaint, or a petition, or other pleading, as being properly stamped or that proper Court-fee has been paid, his act is an act of the Court within the meaning of S. 12, cl. 1.

The next contention is that in this case the proper Court-fee has been paid. Mr. Rangaswami Aiyangar contends that the plaintiff asked for the return of Rs. 1,000 inasmuch as she was led into accepting the sale deed owing to the fraudulent conduct of the defendant, and the contract of sale being invalid, she is entitled to the return of the money paid by her. This contention overlooks the plain fact that the plaintiff could not get back the money paid by her without setting aside the sale. The transaction is not merely a contract but a conveyance. The plaintiff has acquired title to the property under the conveyance executed in her favour. The return of the consideration for the conveyance to the vendee could only be after setting aside the conveyance. So long as

4. (1913) 21 I C 943.

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the plaintiff has the title to the property in her she cannot reasonably ask for the return of the purchase money paid. She can claim damages for breach of guarantee, or breach of covenant or title, but that is not the prayer in the plaint. The plaintiff prays that the sale deed and the mortgage deed, dated 22nd October, 1921, might be declared invalid and not binding on her. This prayer can only be granted on her valuing the suit as if for the cancellation of the sale-deed and by paying the proper Court-fee. If the transaction were a mere contract and not a conveyance, the plaintiff would be entitled to get back the amount paid by her on the ground that she entered into the contract owing to the fraud of the defendant. But, where the property has actually passed from one party to the other, the vendee cannot claim the amount paid by him without setting aside the sale. It is urged that under S. 7, cl. 4 (*c*) the plaintiff is entitled to value the relief sought at Rs. 1,300, as that is the amount she claims. The main relief claimed is really the setting aside of the conveyance and the claim for money is only ancillary to it. To such cases S. 7, cl. 4 (*c*) has no application.

The Court Fees Act has been amended by Act V of 1922 (Madras Act) and the following clause has been enacted :—

> "In a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having such value,
>
> according to the value of the subject-matter of the suit, and such value shall be deemed to be—
>
> if the whole decree or other document is sought to be cancelled, the amount or the value of the property for which the decree was passed or the other document executed."

Here the plaintiff claims relief in respect of what was conveyed under the document. This new clause applies to the present case and I hold that the decision of the Taxing Officer of this Court is correct.

We are indebted to Mr. Anantakrishna Aiyar, the learned Government Pleader, for the valuable assistance he gave us in this matter.

Wallace, J.

Wallace, J. :—I agree.

The scheme of S. 12 of the Court Fees Act is to see that the revenue is not defrauded, that the proper fee payable to Government as the "price" of the trial of the suit has been paid. It is difficult to see how a decision on that point can rest upon the option of parties, or to say that the Act deliberately restrains Courts from interfering on behalf of the

revenue unless the parties themselves, whose interests are in the main opposed to any increase in the Court-fee paid, move in the matter. It is obvious that the section is intended to permit the Taxing Officer of a Court to raise the question *suo motu*, whether the parties have raised it or not. The Privy Council has clearly laid down in *Rachappa Subba Rao* v. *Shidappa Venkatrao* (5) that "The Court Fees Act was passed not to arm a litigant with a weapon of technicality against his opponent but to secure revenue for the benefit of the State. This is evident from the character of the Act and is brought out by S. 12 which makes the decision of the First Court as to value final as between the parties and enables a Court of Appeal to correct any error as to this only where the First Court decided to the detriment of the revenue."

The wording of the section offers no difficulty since, in any case, the trying Court must decide the question of Court-fee implicitly or explicitly, before it can proceed to try the suit. If the Court is not satisfied that the plaint is properly stamped it must dismiss the suit unless the proper stamp-fee is paid—*see* O. 7, R. 11 (*c*). If the question is not explicitly raised and the Court proceeds with the trial, the Court has implicitly decided that the stamp is sufficient. If the parties or the Taxing Officer specifically raise the point then the Court gives an explicit decision thereon. In either case, there is a decision of the Court; but while, when the parties have raised the point, the express decision of the Court will be final between *them*, the section permits the Appellate Court *suo motu* to raise the point in the interests of the revenue. This is the view laid down in *Shama Soondary* v. *Hurro Soondary* (3) with which I respectfully agree; and the same view underlies the decisions in *Narain Singh* v. *Chaturbhuj Singh* (6) and *Surendranath* v. *Sitanath* (4) (the Calcutta High Court), and the decision of the Madras High Court in *Tekana Kavandan* v. *Alagiri Kavandan* (7), and it is not opposed to that of the Full Bench in *Amjid Ali* v. *Muhammad Israil* (8). The case reported in *Shajan Bibi* v. *Earsin Dewan* (2) raised and decided a question of jurisdiction only.

As to the second point it is clear that the mere declaration that the sale deed is not binding on the plaintiff will not enable the Court to decree the return of Rs. 1,000. The

2. (1912) 16 I C 46. 3. (1881) I L R 7 C 348.
4. (1913) 21 I C 943. 5. (1918) I L R 43 B 507 at 518 : 36 M L J 437 (P C)
6. (1898) I L R 20 A 362.
7. (1914) 25 I C 506. 8. (1897) I L R 20 A 11 (F B).

Lakshmi Ammal, *In re.*

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plaintiff is not entitled to have the sale deed remain in being and the return of the Rs. 1,000 also. If the defendant is to pay her the Rs. 1,000, the defendant must also be put in *status quo ante* the sale, that is, the sale must be cancelled. The sale is a bilateral contract, and one party cannot be rid of it merely by a declaration that it is not binding on her. She must release the other party also and place him in *status quo ante*. Hence the petitioner's suit is misconceived. She can have the declaration without the return of the money or she can have the money if the decree also cancels the sale deed. Her chief concern is the return of the money, and that she cannot have unless and until the sale is cancelled. Her suit is therefore one in effect for the cancellation of a sale deed and S. 7 (*iv*) (*a*) of the Court Fees Act applies.

By the Court :—Time for paying the deficient Court-fee will be one week after the re-opening of this Court.

A. S. V. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Sankaralinga Mudaliar (dead) and others ... *Appellants* (Respondents 1 to 3 and L. Rs. by the deceased 1st appellant)*

v.

The Official Receiver of Tinnevelly ... *Respondent (Petitioner).*

Sankaralinga Mudaliar *v.* Official Receiver of Tinnevelly.

Civil Procedure Code, O. 38, R. 11—Attachment before judgment—Properties belonging to several co-parceners—Death after decree of some of the judgment-debtors—Shares if survive to the other co-parceners—Insolvency—Effect of—What vests in Receiver.

An attachment before judgment of properties belonging to the members of a joint Hindu family was followed by a decree and subsequently two of the co-parceners judgment-debtors died. The other co-parceners who were also judgment-debtors were adjudicated insolvents and the question arose whether the shares of the deceased co-parceners passed by survivorship and thus became vested in the Official Receiver. *Held*, an attachment before judgment of co-parcenary property followed by a decree before the judgment-debtors' death has the effect of precluding the accrual of title by survivorship as against the attaching creditor in the same way as an attachment after decree. The accrual of survivorship is not however entirely prevented but operates subject to the prior rights

*A A O No. 435 of 1922. 22nd January, 1925.

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of the attaching decree-holder, and where the properties have been sold in execution, the decree-holder is bound to refund to the Official Receiver only the shares of the insolvent co-parceners. Case-law discussed. *Subrao Mangesh* v. *Mahadevi*, (1913) I L R 38 Bom 105 and *Sunder Lal* v. *Raghunandan Prasad*, (1923) I L R 3 Pat 250 followed.

Appeal against the order of the District Court of Tinnevelly, dated 13th July, 1922, in C. M. P. No. 566 of 1918 in I. P. No. 5 of 1917.

S. T. Srinivasa Gopalachari for appellants.

Marthandam and *Chidambaram* for respondent.

The Court delivered the following

Madhavan Nair, J.

JUDGMENTS :—*Madhavan Nair, J.* :—This is an appeal against the order of the District Judge of Tinnevelly in C. M. P. No. 566 of 1918 on his file in which the Official Receiver of Tinnevelly was the petitioner. The appellants, who were respondents 1 to 3 in the Lower Court, had brought a suit, O. S. No. 106 of 1913, in the District Munsif's Court of Ambasamudram against seven defendants, all members of a joint Hindu family. Pending the suit they applied for and got an attachment before judgment of the joint family properties. The suit was compromised and a razi decree, Ex. I, was passed on the 23rd of September, 1914, which provided that the defendants therein should pay into Court Rs. 2,100 with interest within the 15th of April, 1915, and that, in default, the attached properties might be sold and the amount realised. It also provided that the attachment before judgment which had already been made would continue until the amount fixed by the decree was paid. Defendants 1 and 7 in that suit died subsequent to the decree. After their deaths an execution application was filed in the District Munsif's Court by the decree-holders, the present appellants, and an order for sale of the attached properties was made. Defendants 2 to 6 in the suit were also ordered as the legal representatives of the deceased defendants 1 and 7. A petition for adjudicating defendants 2 to 6 as insolvents was presented to the District Court of Tinnevelly on the 31st of January, 1917, and they were adjudged insolvents by order of that Court dated the 23rd of March, 1917. The attached properties were sold in Court auction on the 28th of June, 1918, in pursuance of the orders of the District Munsif and were purchased by the 4th respondent in the Lower Court. The Official Receiver, who was not a party to the sale proceedings, filed the petition out of which this appeal arises, saying that, as the insolvent's assets had vested in him on the order of adjudication, the subse-

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quent sale is not valid and binding on him and that the sale should, therefore, be set aside. There was also an alternative prayer to the effect that, if for any reason the sale could not be set aside, the decree-holders should be compelled to refund to him the amount they realised in execution.

The District Judge on the first occasion held that he, sitting as a Judge exercising insolvency jurisdiction, had no power to examine the validity or otherwise of an execution sale held by another Court and, therefore, dismissed the petition. On appeal, however, by the Official Receiver to this Court (C. M. A. No. 128 of 1919), this decision was set aside and the petition was remanded to the Lower Court for fresh disposal. The District Judge has now held that the sale itself could not be set aside as the auction purchaser, 4th respondent in the Lower Court, purchased the property *bona fide* and was, therefore, entitled to the protection given to *bona fide* purchasers by S. 34 (3) of the Provincial Insolvency Act (III of 1907), but he has granted the alternative prayer referred to above, *i. e.*, he directed the decree-holders, the present appellants, to refund to the Official Receiver, the respondent before us, for the benefit of the whole body of creditors the sum of Rs. 3,153-2-0 realised by them in execution. He also gave them leave to rank as unsecured creditors in the subsequent insolvency proceedings before the Official Receiver. Against this order of the District Judge the decree-holders have filed the present appeal; the Official Receiver has filed a memorandum of objections stating that the sale should also have been set aside as the auction-purchaser could not in the circumstances of this case be considered to be a *bona fide* purchaser.

Two points have been urged before us by Mr. S. T. Srinivasa Gopalachariar, the learned counsel for the appellants, viz., (1) that on a proper construction of Ex. I, the razi decree, a charge has been created on the attached properties in his clients' favour and that, therefore, the properties vest in the Official Receiver only subject to his clients' rights under the decree, and (2) that even if there is no such charge, inasmuch as two out of seven judgment-debtors had died after the attachment before judgment and also after the decree, such prior attachment followed by the decree prevents the shares of the two deceased co-parceners from surviving to the rest and that, therefore, those shares do not vest in the Official Receiver on the insolvency of the remaining co-parceners as they had never vested in the insolvents themselves. He urges, therefore, that the

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Official Receiver had not rights at least as regards two-sevenths of the properties sold and that his clients were entitled to retain at least two-sevenths of the purchase-money realised.

As regards point No. 1, Ex. 1 only states that the defendants should pay into Court within a prescribed time the decree amount with interest and that, in default of payment, the plaintiffs should recover the amount " from the defendants and also by the sale of the properties now under attachment before judgment by the Court without having any necessity for re-attachment and from the defendants' other properties, and that the attachment before judgment should continue in force until the whole amount is paid according to this compromise decree. " These provisions do not, in our opinion, constitute a charge on the properties and do not confer on the decree-holders any higher rights than those of money decree-holders who have effected an attachment of those properties for executing their decrees.

As regards point No. 2, the learned counsel for the appellants has strongly relied upon a decision of the Privy Council reported in *Suraj Bunsi Koer v. Sheo Pershad Singh*(1) in support of his argument that the attachment before judgment in this case followed as it was by the decree prevented the shares of the deceased co-parceners from surviving to the rest. As it appears to us that the answer to the question now raised depends really upon a correct understanding of the principle laid down by the Privy Council in the above case, it is necessary to consider the exact scope of that decision and to examine how the principle indicated therein has been understood and applied in subsequent decisions. In that case the father had executed a mortgage of properties belonging to the joint family consisting of himself and his two sons. The mortgagee brought a suit on his mortgage against the father and got a decree ordering the sale of the property. In execution of the decree the property was attached and an order to carry out the sale was made. Subsequent to this, but before the date fixed for the sale, the father died and the execution proceedings were thereafter continued against the sons who objected to the sale putting forward their claims as co-parceners under the Mitakshara Law. The executing Court referred them to a separate suit and the properties were sold. In the suit by the sons to set aside the sale it was found that the nature of the debt was such as not to be binding on them. The Privy

1. (1879) I L R 5 C 148 (P C).

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Council set aside the sale as regards the sons' two-thirds share but sustained the sale to the extent of one-third which on a partition in his lifetime would have fallen to the share of the father. It may be stated that the reason for upholding the sale with regard to the one-third share was not that the mortgage executed by the father could be held to be binding on the estate to the extent of his own share because their Lordships expressly leave this point open. In their Lordships' own words the reason for the decision was that "at the time of Adit Sahai's (father's) death, the execution proceedings under which the mouza had been attached and ordered to be sold had gone so far as to constitute, in favour of the judgment-creditor a valid charge upon the land, to the extent of Adit Sahai's undivided share and interest therein, which would not be defeated by his death before the actual sale." It is true that in the Privy Council case there were not only a decree and an attachment in execution of the decree but also an order for sale of the properties before the death of the judgment-debtor; but in the very next sentence their Lordships state that "they are aware that this opinion is opposed to that of the High Court of the North-Western Provinces, in the case of *Goor Pershad* v. *Sheodeen* (2)." In that case there was only a decree and an attachment in execution of the decree but no order for sale before the judgment-debtor's death and it was held that the judgment-debtor had no property in the house in suit available after his death in execution of decree for the satisfaction of the judgment debt. The Privy Council in expressly dissenting from this decision must, we think, be considered to have in effect held that an attachment in execution of a decree before the judgment-debtor's death would prevent his share from surviving to his other co-parceners though no order for sale had been made prior to his death. That this is the true scope of the Privy Council decision has been recognised by more than one decision of this Court [vide *B. Krishna Rao* v. *Lakshmana Shanbhogue* (3) and *Thadi Ramamurthi* v. *Moola Kamiah* (4)]. It may be mentioned that in *B. Krishna Rao* v. *Lakshmana Shanbhogue* (3) also there was not only an attachment in execution of the decree but an order for sale before the judgment-debtor's death but the learned Judges indicate that the decision of the Privy Council would cover even a case where there was no such order, for they

2. (1872) 4 N W P R 137. 3. (1881) I L R 4 M 302.
4. (1914) 16 M L T 123.

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state at page 307, " in declaring that the ruling they were pronouncing was opposed to that of the High Court in the case cited, the Privy Council in effect pronounced that the interest of the judgment-debtor had, by the attachment, been brought under the control of the Court for the purpose of executing the decree so as to preclude the accrual of a title by survivorship in the event of the death of the judgment-debtor before an order for sale was made. In the case before the Court it appears the order for sale was made before the death of the judgment-debtor, but, whether this be so or not, we feel ourselves bound by the ruling of the Privy Council." In *Thadi Ramamurthi* v. *Moola Kamiah* (4) there was only an attachment in execution of the decree but no order for sale before the judgment-debtor's death. The Lower Court in that case had dismissed the suit on the ground that, as the judgment-debtor who was an undivided co-parcener died before the order for sale was made, his interest survived to the defendant and was not available to the plaintiff for sale. The High Court in allowing the second appeal refers to *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1), *B. Krishna Rao* v. *Lakshmana Shanbhogue* (3) and *Lakshmana Aiyar* v. *Srinivasa Aiyar* (5) and states that the question was concluded by authority. Regarding the Privy Council case the learned Judges observe thus :—

> "In the case before the Privy Council it is true that not only was there an attachment but also an order to carry out the sale before the death of the co-parcener. But in the course of their judgment the Judicial Committee expresses their dissent from a judgment of the North-West Provinces High Court in which it was held that, while the co-parcener had died after his interest in the property was attached but before an order for sale was made, there remained no interest in the judgment-debtor which could be brought to sale."

In *Muthuswami Chetty* v. *Chinnammal* (6) it is stated that

> "It has been repeatedly decided by this Court that attachment alone without an order for sale precludes the accrual of the title by survivorship in the event of the death of the judgment-debtor after attachment and before the no interest in the judgment-debtor which could be brought to sale."

It has been brought to our notice that the learned Judges in *Zamindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc., Devasthanam*, (7) state that the decision in *B. Krishna Rao* v. *Lakshmana Shanbhogue* (3) and *Lakshmana Aiyar* v. *Srinivasa Aiyar* (5) cannot be relied upon in view of the decision

1. (1879) I L R 5 C 148 (P C). 3. (1881) I L R 4 M 302.
4. (1914) 16 M L T 123. 5. (1898) 8 M L J 64.
6. (1914) 26 M L J 517 at 518.
7. (1909) I L R 32 M 429 at 442 : 19 M L J 401.

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of the Privy Council in *Moti Lal* v. *Karrabuldin* (8) to the effect that an attachment merely prevented alienation and did not give title. They also state that the same view was taken in *Sankaralinga Reddi* v. *Kandaswami Tevan* (9). These observations have been noticed and commented upon in two later cases of this Court reported in *Murugaiya Mudaliar* v. *Ayyathorai Mudaliar* (10) and *Thadi Ramamurthi* v. *Moola Kamiah* (4). These decisions, with which we respectfully agree, render it unnecessary for us to discuss the matter afresh. In *Thadi Ramamurthi* v. *Moola Kamiah* (4) which has already been noticed above, the learned Judges state in *Sankaralinga Reddi* v. *Kandaswami Tevan* (9) the decision in *B. Krishna Rao* v. *Lakshmana Shanbhogue* (3) was not dissented from, but it was expressly pointed out that under that decision the attachment has the effect of preventing the property passing by survivorship, and the fact that the attaching creditor does not, by attachment, create such a charge on the property as to acquire priority over other creditors coming in is in no way opposed to this view. This also is what was decided in *Zamindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc., Devasthanam* (7) wherein it was held that no charge was created by the attachment in favour of the creditor as against a subsequent creditor. There is no doubt an observation in *Zamindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc., Devasthanam* (7) that the decision in *B. Krishna Rao* v. *Lakshmana Shanbhogue* (3) is opposed to this view. But whether that is so or not, no dissent was expressed from the decision to the effect that the attachment precludes the accrual of title by survivorship. The observation of their Lordships of the Privy Council in *Moti Lal* v. *Karrabuldin* (8) relied upon in *Zamindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc., Devasthanam* (7) has no reference to this question. That such is the effect of this decision seems to be borne out by the judgment in *Murugaiya Mudaliar* v. *Ayyathorai Mudaliar* (10) in which the learned Judges say that the case in *Zamindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc., Devasthanam* (7) had reference to the question whether in the circumstances of that case the judgment creditors who had obtained orders of attachment were in a

3. (1881) I L R 4 M 302. 4. (1914) 16 M L T 123.
7. (1909) I L R 32 M 429 at 442 : 19 M L J 401.
8. (1897) I L R 25 C 179 (P C).
9. (1907) I L R 30 M 413 : 17 M L J 334.
10. (1910) 9 M L T 96.

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stronger position than those who had not obtained such orders." In the light of the above remarks, the observation in *Subrao Mangesh* v. *Mahadevi* (11) that the proposition laid down in *B. Krishna Rao* v. *Lakshmana Shanbhogue* (3) has no longer the support of the Madras High Court is not correct. In this connection we would only add that, having regard to the decision of the Privy Council in *Moti Lal* v. *Karrabuldin*(8) it must now be taken that the word "charge" used by their Lordships in *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1) in the passage extracted by us must be understood only in a general and not in the strictly legal sense (*see* also Mayne's Hindu Law, paragraph 332, 9th Edition).

Thus it will be seen that the decision in *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1) and the later decisions of this Court establish the position that an attachment in execution of the judgment-debtor's interest in joint family property will, in the event of his death subsequent to such attachment, preclude the accrual of title by survivorship as against the attaching creditor.

In the present case the attachment was before judgment. The judgment-debtor died after the decree but before any order for sale was made. The question is whether the fact that the attachment was before judgment makes any difference as regards the application of the above principle. There is a direct authority in *Muthuswami Chetti* v. *Chinnammal* (6) that it does not make any difference. In that decision it was held that an attachment before judgment has the effect of preventing the interest of the deceased judgment-debtor from passing by survivorship in a case where the judgment-debtor dies after the decree. The reason is thus stated by the learned Judges :—

> "When a decree is passed subsequently it is unnecessary to attach the property again and the prior attachment renders the property available for sale in execution. An attachment followed by a decree, therefore, precludes the accrual of the title by survivorship for the same reasons as an attachment after decree."

It has, however, been argued by the learned vakil for the respondent that the decisions in *Subrao Mangesh* v. *Mahadevi* (11) and *Sunder Lal* v. *Raghunandan Prasad* (12) take a contrary view and that they should be followed in preference to the Madras cases. *Subrao Mangesh* v. *Mahadevi* (11) is no doubt a direct decision in his favour, but with all respect

1. (1879) I L R 5 C 148 (P C).
3. (1881) I L R 4 M 302.
6. (1914) 26 M L J 517.
8. (1897) I L R 25 C 179 (P C).
11. (1913) I L R 38 B 105 at 110.
12. (1923) I L R 3 Pat 250.

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we feel unable to follow that decision. In that case the learned Judges begin their judgment by stating that the determination of the case before them depends on the correct construction of the Privy Council judgment in *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1). They then distinguish that case by saying that there, there had been not a mere attachment before judgment but an attachment in execution and an order for sale. They also seem to think that their Lordships of the Privy Council use the word " charge " in the passage extracted by us in its strict legal significance—*vide* page 107. We have already stated that, in our opinion, their Lordships in effect held that an order for sale was not essential for defeating the survivorship and that it is not right to understand the word " charge " as having been used in the strict legal sense. The learned Judges seem to deduce from the Privy Council decision that some step should be taken in execution which will have the effect of defeating the survivorship, but what that step exactly is, in a case where there has already been an attachment before judgment and a decree following it prior to the judgment-debtor's death, they do not state. If as we have shown above a mere attachment in execution is, according to the Privy Council, enough to defeat the survivorship and if in a case where there has been an attachment before judgment and a decree following it there need not be any further attachment after the decree—*vide* O. 38, R. 11 of the Code of Civil Procedure—we fail to see what further step such a decree-holder should take in order to bring matters to the stage where a mere attachment in execution has been made. The learned Judges then rely on a decision of this Court in *Ramanayya* v. *Rangappayya* (13) for the position that an attachment before judgment has not the effect of defeating the survivorship and observe that though in that case the defendant had died before the decree, it does not make any difference whether he dies before or after the decree. This observation does not seem to us to be sound. It is true that until a decree is passed an attachment before judgment could not operate to render the attached property available for sale in execution, but if a decree is also passed before the defendant's death, it is unnecessary to attach the property again and the prior attachment renders the property available for such sale. The decision in *Ramanayya* v. *Rangappayya* (13) has been referred to and distinguished in a later case in *Muthuswami Chetti* v. *Chinnammal* (6)

1. (1879) I L R 5 C 148 (P C). 6. (1914) 26 M L J 517.
13. (1893) I L R 17 M 144.

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which has not been noticed by the Bombay High Court. In *Ramanayya v. Rangappayya* (13) itself the learned Judges clearly indicate that an attachment before judgment would become operative as soon as a decree is passed and that, if the defendant had died subsequent to the decree, they would have held that such prior attachment would defeat the survivorship.

We might also notice that it has been held in *Ganu Singh v. Jangi Lal* (14) that the effect of an attachment of property under the Code of Civil Procedure whether made before or after decree is the same, provided that in the former case a decree is made for the plaintiff at whose instance the attachment takes place,—*see* page 534. In the same judgment it has been observed that " the main object of an attachment before judgment is to enable the plaintiff to realise the amount of the decree supposing a decree is eventually made, from the defendant's property."

For the above reasons we must hold, dissenting from *Subrao Mangesh v. Mahadevi* (11) and following *Muthuswami Chetti v. Chinnammal* (6), that an attachment before judgment followed by a decree prior to the judgment-debtor's death has the effect of precluding the accrual of title by survivorship as against the attaching-creditor in the same way as an attachment after decree. This, however, should not be interpreted to mean that the operation of survivorship is altogether stopped by reason of the attachment whether before or after decree for, if the attaching-creditor does not execute his decree, or if the entire property is not needed to satisfy the decree, then the property or the surplus, as the case may be, will go to the other co-parceners. The decision discussed above should, in our view, be only taken to mean that the other co-parceners take the property subject to the claims of the attaching-creditor.

With regard to the decision in *Subrao Mangesh v. Mahadevi* (11), it might also be mentioned that, while discussing the Privy Council case, the learned Judges seem to make a point of the fact that in the case before them there was no actual sale of the property even after the judgment-debtor's death and seem to indicate that, if there was such a subsequent sale, the prior attachment might preclude the operation of survivorship—*vide* page 109. We do not think that the

6. (1914) 26 M L J 517.
11. (1913) I L R 38 B 105.
13. (1893) I L R 17 M 144.
14. (1899) I L R 26 C 531.

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Privy Council decision justifies the drawing of such a distinction, but, in view of the fact that in the present case there has been an actual sale after the judgment-debtor's death, it is not necessary to discuss the matter any further.

The other case relied upon by the respondent is the one in *Sunder Lal* v. *Raghunandan Prasad* (12) which follows *Subrao Mangesh* v. *Mahadevi* (11). In that case it was found as a fact that there was no attachment before judgment and also that the defendant died just after the hearing of the suit and before the judgment—*see* page 256. The occasion, therefore, for considering the question as regards the effect of an attachment before judgment in a case like the present did not actually arise though the learned Judges state that an attachment before judgment does not rank in the same position as an attachment after judgment. They simply follow the decision in *Subrao Mangesh* v. *Mahadevi* (11) and this case, therefore, does not carry us any further.

In the result the Lower Court's decree will be modified by a direction that the appellants are entitled to retain two-sevenths of the purchase-money realised by the sale of the properties and are bound to refund only the balance to the Official Receiver. For the amount that they have thus to refund and for any further claims that they may have as regards interests and costs they will rank as unsecured creditors in the insolvency proceedings before the Official Receiver. The parties will receive and pay proportionate costs throughout.

Wallace, J.

Wallace, J. :—I am in general agreement with my learned brother as to the conclusion to be properly deduced from the case-law quoted before us, *viz.*, that an attachment before judgment, when followed by a decree passed prior to the death of the judgment-debtor co-parcener, prevents, as against the rights of the attaching creditor, the accrual of the survivorship right to the surviving co-parceners. But I should like to say, though it is not necessary for the present disposal of this case, that I consider that the language used in *B. Krishna Rao* v. *Lakshmana Shanbhogue* (3), *Thadi Ramamurthi* v. *Moola Kamiah* (4) and *Muthuswami Chetti* v. *Chinnammal* (6) cases, on which we rely, is too broad, if interpreted literally. I do not think that these cases intended to lay down more than that so far as concerns the attaching decree-holder's right

3. (1881) I L R 4 M 302.
4. (1914) 16 M L T 123.
6. (1914) 26 M L J 517.
11. (1915) I L R 38 B 105
12. (1923) I L R 3 Pat. 250.

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to hold the share of the deceased co-parcener liable for his debts it is not defeated by the survivorship right, and not any general principle that whenever there is an attachment of co-parcenary property followed by, or preceded by, a decree, the survivorship right of co-parceners to that property is barred. Obviously, for example, if the attaching decree-holder's debt, and the debts of other decree-holders who are entitled in law to take advantage for themselves of the attachment made by another decree-holder, are satisfied, and there remains a surplus out of the share of the deceased judgment-debtor co-parcener, that surplus will accrue by survivorship to the other co-parceners. The proposition that an attachment *plus* decree will in all cases and until the cessation of the attachment prevent the accrual of the survivorship right does not, I think, necessarily follow from the cases quoted and is a proposition which will lead to many practical difficulties in partition and other proceedings. I think the correct way of stating the law is that the accrual of survivorship is not prevented but operates subject to the prior rights of the attaching decree-holder and other decree-holders who are entitled to take advantage of his attachment to have their decree debts satisfied in execution proceedings against what was the share of the deceased judgment-debtor co-parcener. The control over that share which the Court has by virtue of the attachment will be used by it for that end, and will not be relaxed until the end is attained. It is this exercise of this control, which, in my view, constitutes the "valid charge" over the property of which the Privy Council speaks in the *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1) case which "charge" must spring out of the attachment which puts the property under control of the Court, and not out of any subsequent step in execution; only the attachment, if before judgment, must have been followed up by a decree passed before the death of the judgment-debtor co-parcener, since it is the decree which declares the extent of the right which the attaching creditor has against the property.

I agree in the order proposed by my learned brother.

T. S. V. *Decree modified.*

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1. (1879) I L R 5 C 148 (P C).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Nallakakkan Ambalam .... *Appellant** (*Plaintiff*)

v.

Sri Kallalagar Devasthanam through its Manager R. Krishnaswami Aiyangar ... *Respondent* (*Defendant*).

Nallakakkan Ambalam *v.* Sri Kallalagar Devasthanam.

Madras Estates Land Act, S. 46—Occupancy right—Right to confer—Devasthanam—Person improperly appointed to act as trustee of—Grant of occupancy right in Devasthanam land by—Validity.

S was appointed to act as Manager of a Devasthanam on account of the suspension of the permanent incumbent, *A*. *A* filed a suit contesting the validity of the suspension order, and the suspension was held to be illegal by the Civil Courts. During the pendency of the proceedings in the Civil Court, *S*, who was collecting the rents and who was recognised by the Collector and the Board, took a Nuzzar of Rs. 175 and granted the suit land belonging to the Devasthanam to the plaintiff. *Held*, that the plaintiff did not, by the said grant, acquire a right of occupancy in the suit land under S. 46 of the Madras Estates Land Act.

To enable the ryot to get occupancy right under S. 46, the act must be the act of the landholder who is also the owner of the estate.

Second Appeal against the decree of the District Court of Madura in A. S. No. 146 of 1921 preferred against the decree of the Court of the Deputy Collector of the Melur Division in Summary Suit No. 14 of 1920.

T. M. Ramaswami Aiyar for appellant.

A. Srinivasa Aiyangar for respondent.

The Court delivered the following

JUDGMENT :—The first point urged in this second appeal is that the District Judge was not justified in finding that the land in dispute was old waste on the ground that the defendant Devasthanam did not raise the question specifically in the written statement. No doubt the written statement does not raise the question but there is evidence on record to justify the finding of the learned District Judge and this being a question of fact I am bound by the finding. Even though the point was not specifically raised in the written statement, in the pleading or in issues, yet both the parties seem to have adduced evidence as regards that and the matter was evidently argued before the learned Judge and he came to the conclusion that the land was old waste. That being so I do not think the plaintiff has been prejudiced by the finding of the Judge.

The next point urged by Mr. Ramaswami Aiyar is that the plaintiff acquired occupancy right by reason of S. 46 of the

*S. A. No. 1642 of 1922. 24th April, 1925.

Estates Land Act. His contention is that one Sundararama Sastri was the trustee at the time and he took a Nuzzar of Rs. 175 and granted the land to the plaintiff with occupancy right. There is nothing specific in the evidence to show that Sundararama Sastri gave occupancy right. Granting for the sake of argument that he did intend to give occupancy right to the plaintiff, the question is whether he had the right to dispose of the Devasthanam land in a manner prejudicial to the interests of the Devasthanam. Sundararama Sastri happened to be the Acting Manager on account of the suspension of the Manager one Anantakrishna Naidu. Anantakrishna Naidu filed a suit contesting the validity of the suspension order and the suspension of Anantakrishna Naidu was held to be illegal by the Civil Courts. During the pendency of the proceedings in the Civil Court, Sundararama Sastri placed the plaintiff in possession of the plaint land. That he received a Nuzzar is not seriously disputed and though the defendant does not admit that proper pattahs were tendered, yet there is the fact that some pattahs, Ex. A series, were tendered to the plaintiff. But the real question is whether Sundararama Sastri had the right to grant occupancy right over the Devasthanam lands in favour of the plaintiff. Under S. 46 the landlord could confer occupancy right in respect of non-ryoti land on receiving 2 1|2 times the rent. But cl. 5 of S. 46 says : "The sums payable under this section for the acquisition of the occupancy right shall be paid to the landholder who is the owner of the estate or part thereof and any application or proceeding under this section shall be made only to or against such landholder." Though the term 'landholder' may, for certain purposes, include Sundararama Sastri who was collecting the rents and who was recognised by the Collector and the Board, yet in order to enable the ryot to get occupancy right under S. 46 the act must be the act of the landholder who is also the owner of the estate. Under the definition of the term 'landholder' one need not be the owner of the estate in order to be landholder, for a person authorised to collect rents of the whole or portion of the estate by virtue of any transfer from the owner is landholder within the meaning of the term 'landholder' used in S. 3. But there are certain things which can be done only by the landholder who is also the owner. S. 200 is an example of this. I therefore hold that though Sundararama Sastri was landholder for certain purposes he was not the owner of the estate and he could not therefore have given occupancy right to the

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plaintiff. The argument of Mr. Ramaswami Aiyar is that somebody must represent the Devasthanam and at that time Sundararama Sastri represented the Devasthanam and therefore he must be taken to be the owner. The contention overlooks the fact that Sundararama Sastri could not properly represent the Devasthanam as its Manager for the time being, as the suspension of Anantakrishna Naidu was held to be invalid by the Civil Courts. When there is the proper manager or trustee, a person who is appointed improperly in his place cannot be the real trustee and cannot represent the estate. That being so, the act of Sundararama Sastri in favour of the plaintiff could not confer any right as against the Devasthanam. In the result the appeal is dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

G. Govindasami Pillai ... *Appellant** (*Plaintiff*)

v.

V. E. N. K. R. R. M. A. Ramanathan Chettiar and others ... *Respondents* (*Defendants*).

Govindasami Pillai v. Ramanathan Chettiar.

Specific Relief Act, S. 42—Declaration—Suit for—Maintainability—Injunction—Prayer for—Necessity—Trustee—Declaration of right to joint possession of trust properties along with co-trustees—Properties in possession of third party.

Plaintiff and defendants 1 to 3 were trustees of a temple. In proceedings taken under S. 145, Criminal Procedure Code, the temple and its properties were ordered to be attached by the Magistrate. The plaintiff, alleging that the order of the Magistrate attaching the properties was illegal and that he was entitled to joint possession of the properties, sued for a declaration that he was entitled to joint possession and enjoyment of the said properties along with the defendants. The cause of action was given as the order of the Magistrate, and there was no prayer in respect of the office of trusteeship.

Held, that the suit was not bad under S. 42 of the Specific Relief Act for want of a prayer for an injunction.

The plaintiff is not bound to ask for an injunction in a dispute regarding properties where they are in the possession of a third person.

Appeal against the decree of the Court of the Additional Subordinate Judge of East Tanjore at Mayavaram, dated 31st August, 1922, in O. S. No. 39 of 1921.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for appellant.

C. S. Venkatachari for respondents.

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* Appeal No. 1 of 1923. 10th August, 1925.

Govindasami Pillai v. Ramanathan Chettiar.

The Court delivered the following

JUDGMENT :—The plaintiff is the appellant before us. He and the defendants 1, 2 and 3 are trustees of the temple of Chayavanam in Tanjore District. Defendants 2 and 3 were appointed in 1911 and 1st defendant in 1908. The plaintiff alleged that one Ramalingam Pillai was the common agent of the parties and on account of his mismanagement disputes arose, which culminated in proceedings under S. 145, Criminal Procedure Code. During the pendency of those proceedings Ramalingam Pillai died but the Magistrate ordered the attachment of the temple and the properties. The plaint in para. 9 alleges that the order of the Magistrate attaching the properties is illegal and that the plaintiff is entitled to joint possession of the properties. The cause of action is given as the order of the Magistrate dated 17th August, 1918 and the plaintiff prays for a declaration that "he is entitled to joint possession and enjoyment of the properties described hereunder along with the defendants." There is no prayer in respect of the office of trusteeship. Several issues were framed in the case but the suit was dismissed by the Subordinate Judge with reference to the 6th issue, which and issues 5, 7 and 8 were all the issues that were considered by him. He held that the plaintiff was bound to ask for an injunction and as he has not asked for it the suit as framed is bad under S. 42 of the Specific Relief Act and dismissed the suit. We are unable to agree with this view. Mr. Venkatachari, the learned counsel for the respondents concedes that he is not able to cite any case in which it has been held that the plaintiff is bound to ask for an injunction in a dispute regarding properties where the properties are in the possession of a third person. In *Kalabhai* v. *The Secretary of State for India* (1) there is an expression of opinion by Chandavarkar and Ashton, JJ., that the suit in the form in which it was brought is bad. That suit was against the Secretary of State for a declaration that the plaintiff was entitled to hold the land which was the subject-matter of the suit free of assessment. It may be that in such a case an injunction is a proper relief to ask for but we do not wish to express any final opinion about it. The learned Judges granted an amendment and this question was really unnecessary. The cases in *Thakur Prosad* alias *Shumboo Narain* v. *Punkal Singh* (2) and in *Kunhamed* v.

1. (1904) I L R 29 B 19 at 29. 2. (1907) 8 C L J 485.

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Kutti (3) related to decrees. It may be said that in the case of decrees an injunction to the defendant not to execute a decree is the proper relief. *Kunj Bihari* v. *Keshavlal Hiralal* (4) related to an office and it was said in the case of an office a prayer for possession is unnecessary and a prayer for injunction will give all that can also be obtained by a prayer for possession. In *Rachappa Subrao* v. *Shidappa Venkatrao* (5) Sir Lawrence Jenkins said: "It is at once apparent that as to the whole of the property except the house no consequential relief could have been prayed and that even as to the house the injunction prayed was demurrable in the sense that no cause of action was disclosed which could have supported this relief." In that case the property other than the house was in the possession of the Collector and their Lordships thought that it is unnecessary to ask for an injunction. Following this opinion of the Privy Council we think that, though an injunction may be granted if the plaintiff wants it, it cannot be said to be relief which the plaintiff is bound to ask when he does not feel any apprehension from the conduct of the defendant and when he does not feel it necessary to ask for it. We think the suit is maintainable in the form in which it is framed and allowing the appeal we set aside the decree of the Subordinate Judge and remand it to him for disposal according to law. The costs in the High Court will abide the result. The Court-fee paid by the appellant will be refunded.

A. S. V. *Decree set aside : Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR CHARLES GORDON SPENCER, *Officiating Chief Justice*, AND MR. JUSTICE VISWANATHA SASTRI.

Savan Durga Bai Ammal ... *Appellant** (*Plaintiff*)

v.

S. Ramanatha Rao *alias* Rama Rao and another ... *Respondents* (*Defendants*).

Savan Durga Bai Ammal v. Ramanatha Rao.

Letters Patent, Cl. 15—Judgment—Written statement—Amendment of, at plaintiff's instance—Order refusing—Appealability of.

Held, that an order by a Judge sitting on the Original Side of the High Court refusing to direct, at the instance of the plaintiff, certain allegations in the defendants' written statement to be struck out as being unnecessary and

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* O. S. A. No. 27 of 1925. 17th July, 1925.

3. (1891) I L R 14 M 167 : 1 M L J 358.

4. (1904) I L R 28 B 567.

5. (1918) I L R 43 B 507 at 516 : 36 M L J 437 (P C).

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scandalous, was not a "judgment" within the meaning of cl. 15, of the Letters Patent, and was consequently not appealable.

On appeal from the order of the Hon'ble Mr. Justice Waller, dated 27th January, 1925, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 742 of 1924.

T. V. Muthukrishna Aiyar and *Mahomed Ibrahim Saheb* for appellant.

V. S. Govindachar for respondents.

The Court delivered the following

JUDGMENT :—The order appealed against was an order by a Judge sitting on the Original Side of this Court refusing to direct certain allegations in defendants' written statement to be struck out at the instance of the plaintiff as being unnecessary and scandalous.

In our opinion the Judge's order in this case was not a 'judgment' within the meaning of cl. 15 of the Letters Patent and consequently is not appealable. The application was not one which started independent proceedings ancillary to the suit [see the observations of White, C. J. in *Tuljaram Rao* v. *Alagappa Chettiar* (1)] nor could its effect in any event be to put an end to the suit. The order, of course, concluded the proceedings in which the application was made, if that could be regarded as a separate and independent proceeding, but the same might be said of every order made by a Court in the course of the trial of a suit. The proceeding in which Waller, J.'s order was passed was part of the proceedings in the suit itself. Therefore I think that when the learned Chief Justice spoke of putting an end to the suit or proceeding, he was thinking of some kind of independent proceeding which could not be called a suit.

It was held in *Mahalingam* v. *Natesa Aiyar* (2) that an order refusing leave to amend pleadings was not a judgment within the meaning of cl. 15 of the Letters Patent. The present order is of a cognate nature, the difference being only that there the plaintiff sought to amend his own plaint and here the plaintiff wishes to have the defendants' written statement amended.

The fact that no appeal is provided by the Civil Procedure Code against an order under O. 6, R. 16 is an indication that the Legislature intended that there should be no appeal in such cases.

1. (1910) I L R 35 M 1 at 7 : 21 M L J 1 (F B).
2. (1915) 3 L W 107.

Savan Durga Bai Ammal *v.* Ramanatha Rao.

The observation of Waller, J. in *Sonachalam Pillai* v. *Kumaravelu Chettiar* (3) that all orders passed after contest *inter partes* should be regarded as judgments was not necessary for the disposal of that case, which followed the decision in *Tuljaram Rao* v. *Alagappa Chettiar* (1) and appear to us to be too wide. The learned Judge adopted the view of Bittleston, J. in *DeSouza* v. *Coles* (4) from which White, C. J. had expressed his dissent in *Tuljaram Rao* v. *Alagappa Chettiar* (1). The appeal is rejected on the preliminary point of admissibility with costs.

A. S. V. *Appeal rejected.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Venku Shettithi (dead) and others ... *Appellants** (*Plaintiffs*)

v.

T. Ramachandrayya and others ... *Respondents* (*Defts.*)

Venku Shettithi *v.* Ramachandrayya.

Limitation Act, Art. 134—Mortgagee—Transferee of full interest from—Right to plead limitation under Article—Knowledge of real nature of transferor's interest—Effect.

Where the deed of transfer executed by a mortgagee is a sale deed and what was bargained by the transferee is also an absolute sale, the fact that he knew that the transferor had only a mortgagee's interest in the property transferred does not prevent the application of Art. 134 of the Limitation Act.

The omission in Art. 134 of the Act of 1908 of the words "in good faith," which appeared in the corresponding articles of the Limitation Acts of 1859 and 1871 is not without significance, and the onus is not thrown on a purchaser of the full interest from a mortgagee to prove that he acted in good faith before he can plead limitation under Art. 134 of the Act of 1908.

Appeal against the decree of the Court of the Subordinate Judge of South Kanara in O. S. No. 21 of 1919.

C. V. Anantakrishna Aiyar for appellants.

B. Sitarama Rao for respondents.

The Court delivered the following

Spencer, J.

JUDGMENTS :—*Spencer, J.* :—I agree. I am unable to regard the omission of the words "in good faith" which appeared in the corresponding articles of the Limitation Acts of 1859 and 1871, as being without any significance, so as to throw the onus on a purchaser of the full interest from a mortgagee to prove that he acted in good faith before he can plead

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*Appeal No. 182 of 1921. 24th March, 1925.

1. (1910) I L R 35 M 1 at 7 : 21 M L J 1 (F B).
3. (1923) I L R 47 M 316 at 324 : 46 M L J 138.
4. (1868) 3 M H C R 384.

Venkd Shettithi v. Ramachandrayya. —— Spencer, J.

limitation. The same Art. 134 governs both properties conveyed in trust and properties mortgaged when they have been transferred afterwards for valuable consideration. In the case of trust property the Privy Council has decided in *Subbaiya Pandaram* v. *Muhammad Mustapha Marcayar* (1) that a purchaser for valuable consideration with notice of the trust can under Art. 134 plead 12 years' adverse possession as a defence to a suit brought by the trustee. I see no reason to suppose that trusts were intended to be put in a worse position than mortgagors as regards recovery of alienated property. The only distinction between the position of a purchaser from a mortgagee and a purchaser from a trustee is that a mortgagee as such has the mortgage interest, which is assignable, in the property, whereas a trustee as such has no transferrable interest. This distinction is pointed out in *Subbaiya Pandaram* v. *Muhammad Mustapha Marcayar* (2), but nevertheless it was held in that case that a transferee of trust property need not prove good faith before taking advantage of Art. 134, and the decision was confirmed by the Privy Council in *Subbaiya Pandaram* v. *Muhammad Mustapha Marcayar* (1). My judgment in *Kannuswami Tanjirayan* v. *Muthuswami Pillai* (3) was quoted with approval in *Muthaya Shetti* v. *Kanthappa Shetti* (4), and we have not been shown any reason for doubting its correctness beyond a footnote at page 516 of Rustomji's commentary on the Law of Limitation (3rd Edition). The view of the majority of the Full Bench which decided *Seeti Kutti* v. *Kunhi Pathumma* (5) that Art. 134 does not apply to cases where the transferee from a mortgagee does not get possession of the property will not help the appellants before us who are out of possession and ask for delivery of possession. In every case where Art. 134 is set up as a defence by a transferee from a mortgagee it is material to see what interest the mortgagee purported to transfer to him [vide *Rego* v. *Abbu Beari* (6) and *Muthaya Shetti* v. *Kanthappa Shetti* (4), *Veerabhadra Tevan* v. *Veerappa Tevan* (7) and *Baluswami Aiyar* v. *Venkatasami Naicker* (8)]. Ex. II, dated July 16, 1878, purports to be an absolute sale of the properties in A schedule and not a mere assignment of

1. (1923) I L R 46 M 751 : 45 M L J 588 (P C).
2. (1916) 32 M L J 85.
3. (1917) M W N 5.
4. (1917) 34 M L J 431.
5. (1917) I L R 40 M 1040 : 33 M L J 320 (F B).
6. (1897) I L R 21 M 151.
7. (1912) 15 I C 609.
8. (1916) 32 M L J 24.

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Spencer, J.

a mortgage interest in them. I think that both seller and purchaser must have honestly believed that the entire interest of the owner was being transferred by this document, seeing that if Ex. I, dated January 12, 1872, were to be treated as a sale with an option for re-purchase after 4 years and before 6 years, the date for re-purchase had passed and the property had become vested entirely in the purchaser on January 12, 1878. The present suit was rightly found by the Subordinate Judge to be time-barred and the appeal must be dismissed with costs.

Ramesam, J.

Ramesam, J. :—This appeal arises out of a suit for redemption of a mortgage. The plaintiff's predecessors in title, namely one Parameshwari Hengsu and others mortgaged such of the properties as are comprised in Sch. A and the properties in Sch. A-1 to one Manjunatha Naika by Ex. I, dated the 12th January, 1872, for Rs. 14,000. The mortgagee conveyed the properties in Sch. A by Ex. II, dated the 16th July, 1878, to one Venkappa, the ancestor of the defendants and the defendants obtained them for their share at a family partition. The mortgagors assigned the equity of redemption in the mortgaged properties by Ex. B, dated the 12th September, 1906, to one Booba Shetti, from whom it devolved on the plaintiffs under the Aliyasanthana Law. We are not now concerned with the properties in Sch. A-1 as to which the interest of the mortgagee also has come to the plaintiffs' hands by various transactions. The Subordinate Judge dismissed the suit. In appeal the claim for the properties in Sch. A-2 has not been pressed and no reference need be made to them and we are only concerned with the properties in Sch. A. Two points have been argued by the learned vakil for the appellants—(1) Whether Ex. I is a mortgage by conditional sale or a sale with an agreement for re-purchase? (2) Assuming it is a mortgage, whether the suit is barred by limitation under Art. 134 of the Limitation Act?

In the view I take of the second question, I think it is unnecessary to discuss the first. For purposes of discussion I will assume in favour of the appellant that Ex. I ought to be construed only as a mortgage by conditional sale. The question now is whether the properties having been sold by Ex. II, Art. 134 of the Limitation Act does not apply.

Mr. Anantakrishna Aiyar, the learned vakil for the appellants, contends that Art. 134 of the Limitation Act can only apply where the transferee from the mortgagee took the properties in the belief

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that the transferor was absolutely entitled to them. That this was the law under the corresponding articles of the Acts of 1859 and 1871 admits of no doubt. See *Radhanath Doss* v. *Gisborne* (9). But the words "in good faith" which appeared in that article have been omitted in the Acts of 1877 and of 1908. The question is, whether it can be contended that under the Acts of 1877 and of 1908 the knowledge on the part of the purchaser of the true nature of the interest of the transferor prevents the application of Art. 134. Mr. Anantakrishna Aiyar relied on *Singaram Chettiar* v. *Kalyanasundaram Pillai* (10). Though the remarks at page 738 of that decision are somewhat in favour of the appellant, the point was not actually decided in that case. The next decision relied on by him is *Tholasinga Mudali* v. *Nagalinga Chetty* (11), where the *obiter dictum* in *Singaram Chettiar* v. *Kalyanasundaram Pillai* (10) was followed by Sadasiva Aiyar and Napier, JJ. The next case relied on by him is the decision in *Muthaya Shetti* v. *Kanthappa Shetti* (4). In that case, it is observed : "If the transferee bargained for and believed he was bargaining only for the interests of the mortgagee he cannot acquire title as the absolute owner of the property. After all Art. 134 is only a branch of the law of prescription and the question to be determined would be what it is that the purchaser prescribed for. The fact that he knew that his vendor had only a mortgage right would not be conclusive on this question. The real test would be, did he ask for and obtain an absolute right in the property and believe himself that he was having an absolute interest in it ? In *Pandu* v. *Vithu* (12) that is the test that was suggested." I do not see how these remarks of Seshagiri Aiyar, J., help the appellant. If the transferee purported to purchase the absolute interest even though he knew that the transferor had only the interest of a mortgagee the article would still apply according to this view. Bakewell, J., added that "if the title adduced by the vendor and the deed of transfer to the purchaser are consistent with an intention to transfer an absolute interest the burden will lie upon the plaintiff to show that the circumstances of the transfer negative such an intention." He made no reference to the case of *Singaram Chettiar* v. *Kalyanasundaram Pillai* (10) unlike Seshagiri Aiyar, J. The finding shows that

4. (1917) 34 M L J 431.
9. (1871) 14 M I A 1.
10. (1914) M W N 735.
11. (1916) M W N 28.
12. (1894) I L R 19 B 140.

the deed of mortgage in that case was styled a sale deed though construed by the High Court as a mortgage by conditional sale. The period for redemption fixed in it had expired when the deed of transfer was executed and it was said that the vendee would naturally suppose that he was purchasing an absolute title. The finding accordingly was that the transferor intended to transfer an absolute interest and that the intention of the parties was that there should an absolute transfer of title of the property. This finding was accepted by the High Court and the Second Appeal was dismissed. I do not think that this case really supports the appellants.

Mr. Sitarama Rao for the respondent relied on the case *Kannuswami Thanjirayan* v. *Muthuswami Pillai* (3) in which my learned brother took part. He pointed out that the decision in *Veerabhadra Tevan* v. *Veerappa Tevan* (7) was really a case of an assignment of the mortgagee's interest. He also referred to *Venkatachella Reddiar* v. *The Collector of Trichinopoly* (13) which was a case of a transferee from a trustee. He agreed with the decision in *Pandu* v. *Vithu* (12) and differed from Chamier, J.'s opinion in *Ghasi Ram* v. *Kishna* (14) and held that the purchaser need not prove that he purchased in good faith, that is without constructive notice of the restricted nature of the vendor's title. In *Baluswami Aiyar* v. *Venkataswami Naicker* (8) it was held in the case of a transferee from a trustee that knowledge of the limited nature of the transferor's title will not disentitle the transferee from taking advantage of Art. 134 of the Limitation Act. In the case of trusts this is the view also adopted in *Subbaiya Pandaram* v. *Muhammad Mustapha Marcayar* (2) which was afterwards affirmed by the Privy Council in *Subbaiya Pandaram* v. *Muhammad Mustapha Marcayar* (1). These decisions were referred to by the learned Judges who decided *Muthaya Shetti* v. *Kanthappa Shetty* (4) as consistent with their view. To sum up, the possible cases that may arise in a matter of this sort are four :—(1) Where the transfer on its face purports to be an assignment of the mortgagee's interest only. In such a case Art. 134 can never apply. (2) Where the transfer purported to be a sale deed but as a matter of fact

1. (1923) I L R 46 M 751 : 45 M L J 588 (P C).
2. (1916) 32 M L J 85.
3. (1917) M W N 5.
4. (1917) 34 M L J 431.
7. (1912) 15 I C 609.
8. (1916) 32 M L J 24.
12. (1894) I L R 19 B 140.
13. (1914) I L R 38 M 1064.
14. (1915) 30 I C 564.

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only an assignment of the mortgagee's interest was all that was bargained for. It may be conceded that in such a case also Art. 134 does not apply. And this is all that was decided in *Muthaya Shetti* v. *Kanthappa Shetti* (4). (3) Where a deed of transfer is a sale deed and what was bargained by the transferee is also an absolute sale though he knew that the transferor has only a mortgagee's interest. In such a case, though under the Acts of 1859 and 1871 Art. 134 may not apply I think under the Acts of 1877 and 1908 it applies. This is also the view taken by the Calcutta High Court in *Ram Kanai Ghosh* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur* (15) which was also a case of a trustee. Seeing that the Privy Council have come to the same conclusion in *Subbaiya Pandaram* v *Muhammad Mustapha Marcayar* (1) I do not think any value can be attached to the dissent from the decision in *Ram Kanai Ghosh* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur* (15) in *Singaram Chettiar* v. *Kalyanasundaram Pillai* (10). (4) Where the transfer is in the form of a sale deed and the transferee bargained for an absolute interest and acted *bona fide* throughout. To such a case there is no doubt that Art. 134 will always apply. Only the third case is the one in respect of which there seems to be some difference of opinion. But it seems to me that the preponderance of opinion in this High Court, in Bombay, in Calcutta and in the Privy Council is in favour of the view that Art. 134 applies. In the present case, though we may now construe Ex. I to be a deed of mortgage it is impossible to say that the purchaser under Ex. II acted otherwise than *bona fide*. According to the terms of Ex. I the debt was to be paid off after the 12th of January, 1876, and before the 12th of January, 1878 and in default of payment on the latter date, it was to operate as an absolute sale. Under the law as it then stood, the mortgagee might have honestly thought that he obtained an absolute title by the default of payment within the stipulated date and the transferee might have also similarly thought that the transferor had an absolute title. That both were acting perfectly *bona fide* is clear from the recitals in Ex. II. It must be remembered that the Transfer of Property Act had not been enacted in 1878. The Privy Council held in *Pattabhiramier* v. *Venkata Rao Naicker* (16) that the principle that a mortgage is for ever redeemable was not known to the ancient law

1. (1923) I L R 46 M 751 : 45 M L J 588 (P C).
4. (1917) 34 M L J 431.
10. (1914) M W N 735.
15. (1905) 2 C L J 546.
16. (1870) 13 M I A 560.

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Ramesam, J.

of India. It is true that in a later case *Thambusami Moodelly* v. *Hossain Rowther* (17) their Lordships indicated a different rule in the case of mortgages after the year 1858. But the parties to Ex. II might well have thought that in the case of mortgage documents between 1871 and 1875 the decision in *Pattabhiramier* v. *Venkata Rao Naicker* (16) applied. It is true the Madras High Court repelled such a contention, but this was long after 1878. In the above remarks I assumed that the parties to Ex. II knew that the proper construction of Ex. I is that it was a mortgage by conditional sale. But even this is extremely doubtful. Whatever view we may now take of Ex. I there is nothing to show that the parties to Ex. II did not honestly suppose it to be a deed of absolute sale which is what it purported to be. I think the present case is a case where the transferee acted *bona fide* according to the strictest meaning of the term, and Art. 134 applied. There is nothing to show that he did not pay the full value, according to the prices that ruled in 1878. I think the appeal fails on this ground and ought to be dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
PRESENT :—MR. JUSTICE PHILLIPS.

Rao Bahadur M. R. Ry. M. R. Govinda Row, Avl. (Trustee of Piranmalai, etc., Devasthanam) ... *Appellant** (*Plaintiff*)

v.

Chinnathurai Pillai ... *Respondent* (*Defendant*).

Rao Bahadur Govinda Row v. Chinnathurai Pillai.

Madras Estates Land Act, S. 26—Waste land—Bringing into cultivation—Meaning—Limitation Act, Arts. 134, 144—Applicability—Devasthanam land—Permanent lease at favourable rent of, by trustee—Suit by his successor to recover rent in respect of such land—Limitation—Starting point.

"Bringing into cultivation" in S. 26 of the Madras Estates Land Act means cultivating land which had not previously been cultivated, or, at any rate, had not been cultivated for a long period. The mere fact that land lies fallow for one, two, or even four years cannot constitute it as waste land within the meaning of the section.

The plaintiff, the Manager of a Devasthanam, sued to recover rent in respect of certain lands belonging to the Devasthanam which were granted on a permanent lease at a favourable rent by one of his predecessors. The suit

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*S. A. No. 831 of 1924. 12th August, 1925.

16. (1870) 13 M I A 560.

17. (1875) I L R 1 M 1 (P C).

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was brought more than 12 years after the date of the transfer but within 12 years of the date of the accession of the plaintiff trustee to his office.

Held, that Art. 134 was inapplicable to the case and that the suit was not barred under Art. 144 of the Limitation Act.

Second Appeal against the decree of the District Judge of Ramnad at Madura, dated 27th August, 1923, in A. S. No. 853 of 1921 preferred against the decree of the Court of the Special Deputy Collector of Manamadura, dated 26th July, 1921, in Summary Suit No. 185 of 1918.

T. L. Venkatrama Aiyar for appellant.

K. Rajah Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The plaintiff in this case is the Manager of the Piranmalai Devasthanam and he sues to recover rent in respect of certain lands belonging to the Devasthanam which were granted on a permanent lease at a favourable rent by one of his predecessors. The Lower Appellate Court has held that the suit is barred by limitation because the starting point of limitation under Art. 134 is the date of the transfer which in the present case was more than 12 years before suit. He has come to this conclusion on the ground that the lease was void *ab initio* as the trustee of the Devasthanam had no right to grant a permanent lease of the trust properties and that therefore the period started from the date of the lease. The appeal was also opposed by the respondent on the ground that the lease was justifiable under S. 26 of the Estates Land Act, that is to say, because it was a lease granted for the purpose of bringing waste land into cultivation. Although the lease recites that this land was overgrown, that the irrigation source was out of repair and that the land was uneven, it does not appear that the land was waste land within the meaning of S. 26. I agree with the District Judge that "bringing into cultivation" means cultivating land which had not previously been cultivated or at any rate had not been cultivated for a long period. The mere fact that land lies fallow for one, two or even four years cannot constitute it as waste land within the meaning of that section. Otherwise land lying fallow for even one year would come within the definition.

The main question is whether the suit is barred by limitation. The Lower Appellate Court has held that the permanent lease being invalid must be deemed to have been invalid from the date of the alienation and that therefore the limitation period must be calculated from that date, the possession of the lease being adverse from that date. In this conclusion

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I think the District Judge is clearly wrong. The point was decided in *Mahomed* v. *Ganapati* (1) in a case precisely analogous to the present and it was there held that the period of limitation ran not from the date of the permanent lease but from the date of the accession of the plaintiff trustee to his office. This was followed in *Sathianamma Bharati* v. *Saravanabagi Ammal* (2). In *Vidya Varuthi* v. *Baluswami Aiyar* (3) the same point was decided with reference to a Mutt and a Matadhipathi or Pandarasannadhi of that Mutt. Although in that case the religious institution in question was a mutt, a perusal of the judgment shows clearly that their Lordships draw no distinction between a mutt as such and other Hindu religious institutions. The two cases I have cited above are referred to in their Lordships' judgment and referred to with approval. The basis of the decision is that ordinarily trust property belonging to Hindu religious institutions is not vested in the so-called trustee who is not in the position of an express trustee as understood in English law. As the property does not vest in him Art. 134 of the Limitation Act is not applicable because the property has not been conveyed or bequeathed in trust and afterwards transferred by the trustee, as the manager of the institution is not a trustee within the meaning of the Article. That this is the view taken by their Lordships is, I think, clear from the passage in the judgment at page 847: "From the above review of the general law relating to Hindu and Muhammadan pious institutions, it would *prima facie* follow that an alienation by a manager or superior, by whatever name called, cannot be treated as the act of a 'trustee' to whom property has been 'conveyed in trust' and who by virtue thereof has the capacity vested in him which is possessed by a 'trustee' in the English Law."

For the respondent it is urged that *Vidya Varuthi* v. *Baluswami Aiyar* (3) does not apply to the present case but he is not able to point out any principle on which a distinction can be drawn. Reliance is placed on another case of the Privy Council in *Subbaiya Pandaram* v. *Muhammad Mustapha Marcayar* (4), but that was a case of a specific trust and consequently it was held that Art. 134 was applicable. I am clearly of opinion that Art. 134 is not applicable to the present suit.

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1. (1889) I L R 13 M 277.
2. (1894) I L R 18 M 266 : 4 M L J 223.
3. (1921) I L R 44 M 831 : 41 M L J 346 (P C).
4. (1923) I L R 46 M 751 : 45 M L J 588 (P C).

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It is then argued that under Art. 144 the suit would be barred, the contention being that from the date of the alienation there was possession adverse to the idol and consequently that after 12 years of such adverse possession the suit is barred. This is the view expressed in an *obiter dictum* in *Mahant Ramrup Gir v. Lal Chand Marwari* (5) and the proposition is sought to be supported by *Damodar Das* v. *Lakhan Das* (6). The former case seems to be directly opposed to the Madras decisions and therefore I need not further consider it. As regards the case in *Damodar Das* v. *Lakhan Das* (6) the facts show that the dispute was between two *chelas* or trustees and in so far as the idol was concerned it was not held that the idol had lost any rights in the property. The question decided was that one particular *chela* had by adverse possession required a right of management as against the representative of another *chela*. That is not the point here. The point has been dealt with in *Jagadindra Nath Roy* v. *Hemanta Kumari Devi* (7). In that case property belonging to an idol had been alienated and the alienation occurred during the minority of the trustee. The contention raised there was that this minority of the plaintiff was of no avail, inasmuch as time had begun to run as against the idol. This contention was negatived by their Lordships on the ground that the idol had no power to bring a suit except through the trustee. Consequently there could be no question of a suit being barred inasmuch as it could not have been brought at an earlier date. There is, therefore, no reason why, even if Art. 144 is applied, the decision in *Mahomed* v. *Ganapati* (1) should not apply. Following that decision I must reverse the decree of the District Judge and restore the decree of the Deputy Collector with costs throughout.

A. S. V. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

The Official Receiver, Tanjore ... *Appellant** (*Petitioner*)

v.

R. M. Nagaratna Mudaliar ... *Respondent* (*Respondent*).

Official Receiver, Tanjore v. Nagaratna Mudaliar.

Civil Procedure Code, O. 34, R. 14—Applicability—Civil Procedure Code, O. 20, R. 11 (2)—Security bond given by judgment-debtor to decree-holder pur-

*A A O No. 46 of 1925. 20th April, 1925.

1. (1889) I L R 13 M 277.
5. (1922) I L R 1 Patna 475.
6. (1910) I L R 37 C 885 : 20 M L J 624 (P C).
7. (1904) I L R 32 C 129 (P C).

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suant to order under—Enforcing of, in execution—Decree-holder's right of—Decree against father only—Bond given by father and sons—Adjudication of judgment-debtor as an insolvent subsequent to execution of bond—Effect—Provincial Insolvency Act of 1920, S. 52—Effect—Applicability to money decree-holders who have obtained securities in respect of properties covered by such securities.

Immoveable properties given by a judgment-debtor as security pursuant to an order made under O. 20, R. 11, cl. (2) of Civil Procedure Code can be realised by the decree-holder in execution, and he is not obliged to have recourse to a regular suit for the purpose. O. 30, R. 14 of Civil Procedure Code is no bar to the decree-holder realising such security in execution.

The mortgage or charge mentioned in O. 30, R. 14, Civil Procedure Code, must obviously be a mortgage or charge existing prior to the decree and not one created by the decree itself or one created by the act of parties subsequent to the decree.

The words "claim arising under the mortgage" have been substituted in O. 30, R. 14, Civil Procedure Code, for the words "any claim whether arising under the mortgage or not" in the repealed S. 99 of the Transfer of Property Act ; and the effect of this alteration is to confine the prohibition against bringing the mortgaged property to sale except by bringing a suit, to cases where a mortgagee has obtained a personal decree against the mortgagor on the mortgage debt.

Held further, that neither the terms of the security bond by which the security referred to above was given nor the order of the Court passed as a result of the execution of such bond precluded the security from being enforced in execution.

Held also that the fact that the decree was passed against the father only while the bond was executed by him and his sons was not a bar to the security being enforced in execution.

S. 52 of the Provincial Insolvency Act of 1920 does not apply to mortgage decree-holders ; and money decree-holders who have obtained securities in respect of the properties covered by such securities must also be treated as secured creditors for the purposes of the section.

Held, that a decree-holder could realise in execution immoveable properties given by his judgment-debtor as security pursuant to an order made under O. 20, R. 11 (2) of Civil Procedure Code, notwithstanding that the judgment-debtor was adjudicated an insolvent subsequent to the execution of the security bond and prior to the attachment and sale of the secured properties by the decree-holder.

Appeal against the order of the District Court of East Tanjore at Negapatam, dated the 30th January, 1925, in I. A. No. 50 of 1925 in I. P. No. 20 of 1924.

T. M. Krishnaswami Aiyar and *S. Panchapagesa Sastri* for appellant.

S. Varadachari and *A. Ganesa Aiyar* for respondent.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS :—*Venkatasubba Rao, J.* :—I shall briefly state the facts that have given rise to this appeal. Execution was taken out of a money decree and the judgment-debtor

agreed to pay the decree-holder interest at an enhanced rate and executed in his favour a security bond in respect of certain immoveable properties. As a result of this an order was made postponing execution under O. 20, R. 11, Civil Procedure Code. The judgment-debtor was subsequently adjudicated an insolvent and on the decree-holder seeking to attach the properties secured and bring them to sale, the Official Receiver applied to the Insolvency Court for an order to stay the sale directed by the executing Court. The application was refused by the District Judge of East Tanjore and this appeal has been filed questioning the correctness of his order.

Mr. Varadachariar, the learned vakil for the decree-holder, objected that apart from the merits of the case the Insolvency Court would have no power to make an order binding upon the Court executing the decree. As on hearing full arguments on the other contentions raised we intimated that we were against the appellant; Mr. Varadachariar did not have to argue the point relating to the power of the Insolvency Court. I shall therefore proceed to deal with the case as if the objection to the property being sold had been raised before the executing Court itself.

Mr. T. M. Krishnaswami Aiyar, the learned vakil for the appellant, advanced two main contentions :—(1) A security of this kind cannot be enforced in execution, as to do so will contravene the terms of O. 34, R. 14, Civil Procedure Code. (2) That under S. 52 of the Provincial Insolvency Act (V of 1920) the executing Court on being informed that the judgment-debtor has become an insolvent is bound to stay the sale and direct the property to be handed to the Receiver in insolvency.

I shall deal with these contentions in the order in which I have stated them.

The first contention is based on the terms of O. 34, R. 14, Civil Procedure Code. It runs thus :—

> "Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage * * * * * * *."

Every essential is wanting in this case. The section contemplates a mortgage and a decree. Under the section there must be first a mortgage and then a decree in respect of a claim arising under the mortgage. The position here is reversed. Long previous to the mortgage there was a decree and it was

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impossible that the decree could be in respect of a claim arising under a mortgage which was non-extant. The section therefore does not in terms apply.

Where the charge is created by the decree itself O. 30, R. 14 can have no application. See *Sowbagia Ammal* v. *Manicka Mudaliar* (1) and *Indramani Dasi* v. *Surendra Nath Mandal* (2).

Where the security comes into existence subsequent to the decree, the principle applies *a fortiori* and O. 34, R. 14 cannot be a bar.

In this connection I may notice two sets of cases to which reference has been made at the bar.

First, cases under S. 145, where in execution security was sought to be enforced against a surety.

Second, cases under certain other sections of the Code where the judgment-debtor was the party against whom security was attempted to be enforced.

Let me first deal with cases under S. 145. In *Mukta Prasad* v. *Mahadeo Prasad* (3) the property of the surety was allowed to be sold in execution. The ground of the decision was that he rendered himself personally liable and his personal liability could be enforced by the very property given as security being attached and sold. In *Amir* v. *Mahadeo Prasad* (4) it was held that although the surety had made himself personally liable the charge against the property could be enforced only by means of a regular suit. I may point out that though *Mukta Prasad* v. *Mahadeo Prasad* (3) was in this case distinguished, the ground of the distinction is wrong as what was attempted to be sold was not merely the judgment-debtor's equity of redemption. In *Mussammat Chandrabati* v. *Madho Prasad* (5) the bond created a personal liability but it was held that the property given as security could not be sold in execution although the personal liability of the surety could be otherwise enforced. In *Rajendra Lal Das* v. *Lakhmi Narain Khanna* (6) S. 145 was held inapplicable as the surety had not undertaken any personal liability and the properties were not allowed to be sold in execution. In *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (7) their Lord-

1. (1917) 33 M L J 601.
2. (1921) 35 C L J 61.
3. (1916) I L R 38 A 327.
4. (1916) I L R 39 A 225.
5. (1914) 19 C W N 178.
6. (1915) 19 C W N 961.
7. (1919) I L R 42 A 158 : 38 M L J 302 (P C).

ships of the Judicial Committee observe that if the surety has not rendered himself personally liable, S. 145 has no application, but when there is a personal liability undertaken the question is left open.

An examination of most of these cases will show that what is mainly said to be in the way of the security being enforced is the repealed S. 99 of the Transfer of Property Act or the provision now corresponding to it, namely, O. 34, R. 14, Civil Procedure Code.

These cases, in my opinion, may be easily disposed of as they deal with a specific section of the Code which gives express rights against a surety and what these rights are, must be determined with reference to that section alone. We are not now in this appeal concerned with S. 145.

I shall now deal with cases where a security bond was executed by a party to the suit itself. In *Shyam Sundar Lal* v. *Bajpai Jainarayan* (8) an application was made by the defendant judgment-debtor for stay of execution and it was granted upon his giving security in the sum of Rs. 10,000. By the security bond which was executed certain properties were mortgaged as security for the due performance of the decree. The decree-holder applied for realisation of the decree amount by sale of the properties comprised in the bond. S. 99 of the Transfer of Property Act was relied on by the judgment-debtor who opposed the application. It was held that that section was not a bar as the bond was not addressed to the decree-holder but was in favour of the Court and that therefore there was no mortgage created.

In *Tokhan Singh* v. *Girwar Singh* (9) the judgment-debtors executed a bond to the Registrar of the Court as security for the costs of the respondents in appeal to the Privy Council. They sought to enforce the security by selling in execution of the decree for costs the property comprised in the bond. It was held that a valid mortgage was created and that under S. 99 of the Transfer of Property Act the security could not be enforced without the institution of a regular suit.

Although *Shyam Sundar Lal* v. *Bajpai Jainarayan* (8) was distinguished in *Tokhan Singh* v. *Girwar Singh* (9) on the ground that in the former case the bond was given to the Court and in the latter it was executed to the Registrar, these decisions are in truth irreconcilable.

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8. (1903) I L R 30 C 1060. 9. (1905) I L R 32 C 494.

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S. 99 of the Transfer of Property Act has been replaced by O. 34, R. 14 of the Civil Procedure Code. The repealed section ran thus :—

"Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under S. 67* * * * *."

O. 34, R. 14 has been reproduced in an earlier part of this judgment.

The effect of the alteration is to confine the operation of the rule to cases where a mortgagee has obtained a personal decree against the mortgagor on the mortgage debt. In such a case, the mortgagee can have the property sold only by instituting a regular suit for sale. The Madras High Court in *Subramanian Chettiar* v. *Rajah of Ramnad* (10), recognising the effect of this alteration has held that the provision now in force does not stand in the way of the property given as security being sold in execution. In that case immoveable property was given by a judgment-debtor as security for the due performance of a decree pursuant to an order made under O. 41, R. 5 (3), Civil Procedure Code, and it was held that the property could be sold in execution without recourse being had to an independent suit. I may mention that in *Baij Nath Goenka* v. *Mohant Sia Ram Das* (11) the Calcutta High Court held that S. 99 did not operate as a bar. This was decided later than *Shyam Sundar Lal* v. *Bajpai Jainarayan* (8) and *Tokhan Singh* v. *Girwar Singh* (9) and previous to *Subramanian Chettiar* v. *Rajah of Ramnad* (10). The referring Judges advert to the conflict of authority and indicate a clear preference in favour of the view that the property can be sold in execution.

In the most recent case, *Jyoti Prakash Nandi* v. *Mukti Prakash Nandi* (12) the view of the Madras High Court has been followed.

The weight of authority therefore supports the view that security given by a judgment-debtor can be enforced and the property covered by the bond be sold in execution.

In the cases mentioned above, security was not taken under O. 20, R. 11 and on this ground it may be contended that there is no direct authority on the question raised. But in principle is there any difference ? O. 20, R. 11 contemplates

8. (1903) I L R 30 C 1060. 9. (1905) I L R 32 C 494.
10. (1917) I L R 41 M 327 : 34 M L J 84.
11. (1913) 17 C L J 267. 12. (1923) I L R 51 C 150.

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a complete or qualified stay of execution and some of the sections, at any rate, considered in those cases provide similarly for stay of execution. If the view of the law taken in those cases is correct, the fact that in the present case the security bond was taken under O. 20, R. 11 makes no difference and we must hold that the decree-holder in execution of his decree and without being compelled to file a regular suit can bring the property to sale.

In regard to cases that arise under O. 20, R. 11, the principle may be thus stated. Unless it is shown that the security was taken in satisfaction of the decree it was presumably intended that the order made should be capable of execution. If on a construction of the order the Court comes to the conclusion that the decree is not satisfied and there is no bar created which precludes the decree from being executed, it is the duty of the Court to allow execution by enforcing sale. Whether it be regarded that what is sought to be executed is the original decree itself or an executable order made under the special provision of the law contained in O. 20, R. 11, it makes very little difference.

In *Subramanian Chettiar* v. *Rajah of Ramnad* (10) the learned Judges took the view that it is not only the right of the decree-holder to bring the property to sale in execution but that under S. 47, Civil Procedure Code, the remedy by way of regular suit is not open to him. It is not necessary to rest my judgment on this ground.

General considerations were strongly pressed before us both in favour of and against the acceptance of this view.

In *Tokhan Singh* v. *Girwar Singh* (9) and in *Amir* v. *Mahadeo Prasad* (4) the view that it is impolitic to sell the property in execution is set forth. In the first case Mookerjee, J. says thus :—

> "It is quite conceivable for instance that after a property has been given in security by the judgment-debtor an interest may be acquired in it by other persons ; if it is sold in execution of the decree, it would in such a case be necessarily sold behind the back of persons interested who would have no opportunity to redemption and their interest would not be prejudiced by the sale and they would be entitled to enforce their claim by independent suits."

Weighty reasons are given for the view I am disposed to take by the referring Judges in *Baij Nath Goenka* v. *Mohant Sia Ram Das* (11). The provision is embodied in the law

4. (1916) I L R 39 A 225 at 228.
9. (1905) I L R 32 C 494 at 500.
10. (1917) I L R 41 M 327 : 34 M L J 84.
11. (1913) 17 C L J 267 at 274.

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for the protection of the decree-holder and it must be interpreted to operate to his advantage. By refusing to sell the property in execution far from securing to the decree-holder the due execution of his decree the Court renders the decree itself incapable of execution against the property covered by the security. This is clearly unjust. This view is shared by the learned Judges who decided *Subramanian Chettiar* v. *Rajah of Ramnad* (10), for to quote their very words "It would be a most mischievous state of law if such a thing (a mortgage suit) were necessary and it would fetter the discretion of the Court in accepting immoveable property as security * * * *" In my opinion if it is permissible to advert to such general considerations the balance of convenience is clearly in favour of the view taken by the Calcutta Judges and the learned Judges of this Court.

Mr. Varadachariar suggested that if there are subsequent encumbrancers their right will be to proceed against the surplus money, if any. On the other hand, Mr. T. M. Krishnaswami Aiyar urged that such encumbrancers will be entitled to redeem the purchaser at the sale. I do not propose to express any opinion on this point as this has only a remote bearing on the question to be decided in the appeal.

Then arises the question, is there anything in the security bond or the order of the Court which precludes the security from being enforced in execution ? In my opinion there is no obstacle created. On the contrary, the effect of the security bond seems to recognise this right of the decree-holder. The debtor renders himself personally liable, creates the charge and covenants that the security bond shall be in force till the decree is entirely satisfied. The order of the Court recites the fact that the security bond has been executed. On a construction of the bond and the order I am of the opinion that the parties intended that the security should be capable of being realised in execution.

I have now disposed of the first contention raised by Mr. Krishnaswami Aiyar. I shall proceed to deal with the second contention, namely, that based upon S. 52 of the Insolvency Act. Under that section, where after execution has issued the executing Court receives notice of the insolvency of the judgment-debtor it is bound to direct the property if in its possession

10. (1917) I L R 41 M 327 : 34 M L J 84.

to be delivered to the Receiver in insolvency. It is conceded by Mr. T. M. Krishnaswami Aiyar that this does not apply to mortgage decree-holders and this is obvious enough. But he says that the decree in question being a money decree the fact that the decree-holder is a secured creditor makes no difference and that S. 52 applies. I am unable to agree. S. 52 is somewhat generally worded, but it must receive a construction not repugnant to the general scheme of the Act, namely, to save the rights of secured creditors. It is sufficient to refer in this connection to S. 28 (6), S. 47 and S. 51 (2). There is nothing in the wording of these sections to show that money decree-holders who have obtained security are excluded. Under S. 2, 'creditor' is defined as including a decree-holder, 'debt' as including a judgment debt and 'secured creditor' is described as a person holding a mortgage charge or lien on the property of the debtor as security for a debt due from him. I am clearly of the opinion that S. 52 does not apply.

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Venkatasubba Rao, J.

I have so far dealt with the two main contentions raised on behalf of the appellant. There is a subsidiary point which has been taken on his behalf and I shall now proceed to deal with it. It is said that the decree was passed against the father only but that the bond was executed by the father and the sons and that therefore the property cannot be sold in execution. There might be some force in the argument if the bond had been executed not by the sons of the judgment-debtor but by others. But in the present case the decree-holder's right is not enlarged nor is the liability of the executants affected by reason of the existence of the security bond. It was executed by the father as the guardian of his minor sons and whether they were parties to it or not their right would still be the same, namely, to question the debt if it is tainted with illegality or immorality. The circumstance that sons are also parties to the bond therefore makes no difference.

The order appealed against must be upheld and the appeal fails and is dismissed with costs.

Madhavan Nair, J.

Madhavan Nair, J.—The facts of the case are fully set out in my learned brother's judgment. The first question arising for our decision is whether the immoveable properties given by the judgment-debtor as security pursuant to an order made under O. 20, R. 11, cl. (2), Civil Procedure Code, can be realised by the decree-holder in execution or can only be realised in a separate suit.

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The material portion of the security bond runs as follows :—

"..............Whereas on your petition attachment has been ordered of our lands in Tenkarai Isanur for the said decree amount, whereas you have consented at our request not to proceed with the attachment and sale, we have hereby given as security to you for the amount of Rs. 12,620-4-0 being the amount up to date under the said decree our properties as mentioned in the schedule...... We shall pay you without trouble or compulsion the abovesaid decree amount etc., according to the terms of the kararnama petition (viz., petition under O. 20, R. 11 of the Code of Civil Procedure).................If we do not pay you accordingly you shall execute the said decree according to the terms of the kararnama petition, and for the balance, if any, after what is so realised by you, we undertake to pay you up to the limit of Rs. 12,620-4-0 on the security of the said properties and on our personal responsibility."

The circumstances relating to the execution of the security bond clearly show that the parties to the security bond intended that if the attachment and sale of the properties became necessary it should be done in execution. The security bond was executed after attachment was ordered ; the judgment-debtor made himself personally liable ; and the bond is to remain in force till the decree is fully satisfied. The security is intended to be operative if the judgment-debtor does not pay the decree amount and interest. Provision for the contingency of non-payment being made by the security bond, the parties could not have meant that when such contingency arose they should institute a separate suit to realise the properties covered by the bond. There can be no doubt that the parties intended that the properties should be realised if necessary in execution. But whatever be the intention of the parties, if there is any legal impediment in the way of realisation by execution, then the decree-holder will have to realise his security only by means of a separate suit. It has been strenuously argued by Mr. T. M. Krishnaswami Aiyar on behalf of the appellant that O. 34, R. 14 of the Code of Civil Procedure operates as a bar to the enforcement of the security in execution.

Rule 14 of O. 34 provides as follows :—

"Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he should not be entitled to bring the mortgaged property to a sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such, notwithstanding anything contained in O. 2, R. 2."

The words "claim arising under the mortgage" have been substituted in this rule for the words "any claim whether arising under the mortgage or not" in the repealed S. 99 of the

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Transfer of Property Act. The effect of this alteration is to confine the prohibition against bringing the mortgaged property for sale except by bringing a suit, to cases where a mortgagee has obtained a personal decree against the mortgagor on the mortgage debt. Obviously the rule in terms does not apply to the present case. The language of the rule makes it clear that the rule does not apply unless the decree obtained by the holder of the mortgage or charge falls within the description of a decree for payment of money in satisfaction of a claim arising under the mortgage or charge. The mortgage or charge mentioned must obviously be a mortgage or charge existing prior to the decree and not one created by the decree [see *Indramani Dasi* v. *Surendra Nath Mandal* (2)] or one created by the act of parties subsequent to the decree.

Having regard to the important change introduced by O. 34, R. 14, it has been held in *Sowbagia Ammal* v. *Manicka Mudaliar* (1), *Indramani Dasi* v. *Surendra Nath Mandal* (2) and *Brajasunder Deb* v. *Sarat Kumari* (13) that where a maintenance decree provided that the allowance in the decree should be charged on certain immoveable properties, such properties could be sold in execution of the decree and that there was no necessity to bring a separate suit for sale. The decision in *Subramanian Chettiar* v. *Rajah of Ramnad* (10) is an instance of a case where the security was given by the judgment-debtor after a decree. In that case immoveable property was given by a judgment-debtor as security for the due performance of the decree in compliance with an order made under "O. 41, R. 5 (3)" and the question was raised whether such property can be realised by the decree-holder in execution or can only be realised by a separate suit. In view of the alteration of the language contained in O. 34, R. 14, it was held that the provision contained in that rule did not operate as a bar and that the decree-holder can realise the property in execution. The learned Judges observe :—

"There is no need in such a case that there should be anything in the nature of a mortgage suit for sale under S. 67 of the Transfer of Property Act with all the expense and delay which would be thereby involved. It would be a most mischievous state of law if such a thing were necessary and it would fetter the discretion of the Court in accepting immoveable property as security for the execution of the decree."

1. (1917) 33 M L J 601.
2. (1921) 35 C L J 61 at 64.
10. (1917) I L R 41 M 327 : 34 M L J 84.
13. (1916) 38 I C 791.

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In the order of reference to the Full Bench in *Baij Nath Goenka* v. *Mohant Sia Ram Das* (11) the learned Judges while discussing the principle underlying the provisions of S. 545, cl. (*c*) of the old Code of Civil Procedure point out that the provisions embodied in the law for the protection of the decree-holder must be interpreted to operate to his advantage and express their inclination to accept the view that the properties covered by the security bond executed pursuant to an order under that section could be realised in execution of the decree without instituting a separate suit. On this question the view of the Madras High Court in *Subramanian Chettiar* v. *Rajah of Ramnad* (10) has been followed in the most recent case in Calcutta reported in *Joti Prakash Nandi* v. *Mukti Prakash Nandi* (12).

In my view the principle underlying the decision in *Subramanian Chettiar* v. *Rajah of Ramnad* (10) which relates to the realisation in execution of properties covered by security bond executed after a decree may well be applied to the decision of the present case though the security bond here has been executed not under O. 41, R. 5, but only under O. 20, R. 11, cl. (2). It has been argued that an order passed under O. 20, R. 11, cl. (2) is incapable of execution. Whether this is so, or not, is largely a question of the construction of the order and of the intention of the parties as may be gathered from the circumstances relating to the making of the order. I have already pointed out at the commencement of my judgment that there can be no doubt that the parties in this case intended that in the event of non-payment by the judgment-debtor the properties covered by the bond should be realised in execution. Execution being postponed by the order made under O. 21, R. 11, cl. (2) which provided also for the taking of a security bond to meet the possible contingency of non-payment by the judgment-debtor, I fail to see when such contingency arises how the Court can refuse execution unless there be some legal impediment compelling the Court to disallow it.

All the cases discussed above show that if O. 34, R. 14 does not operate as a bar, then the decree-holder can proceed against the secured properties by execution. But it is argued by Mr. Krishnaswami Aiyar that even then, in this case, the properties charged cannot be sold in execution because the minor sons of the judgment-debtor who were not parties to the

10. (1917) I L R 41 M 327 : 34 M L J 84.
11. (1913) 17 C L J 267 at 274.
12. (1923) I L R 51 C 150.

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suit have joined in the execution of the security bond, their father representing them as guardian. There is no force in this contention. The new parties are not strangers but only the sons of the judgment-debtor. In view of the fact that the judgment-creditor is not seeking to sell under the security bond any interest which he could not otherwise have sold, I think this objection must be overruled.

Before I pass on to consider the second argument, I may state that it is unnecessary to discuss the decisions in *Mukta Prasad* v. *Mahadeo Prasad* (3), *Amir* v. *Mahadeo Prasad* (4) and *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (7) quoted by the appellant's learned vakil in connection with his argument regarding the bar created by O. 34, R. 14, as all these cases dealt with securities given by third parties under S. 145 of the Code of Civil Procedure.

The second question for decision arises in connection with the argument based on S. 52 of the Provincial Insolvency Act. According to that section, where execution of a decree has issued against any property of a debtor which is saleable in execution and before it has been actually sold, notice is given to the executing Court that an insolvency petition by or against the debtor has been admitted, then the executing Court is bound, on application to that effect, to direct the property if in the possession of the Court to be delivered to the Receiver. It is argued by Mr. Krishnaswami Aiyar that the decree which is sought to be enforced in this case being a money decree, S. 52 of the Act applies, and that, notwithstanding the fact that a security has been executed in favour of the decree-holder subsequent to the decree, his client is entitled to apply to the executing Court to deliver over the property in question to him. Although a secured creditor is not expressly excluded from the operation of this section, it seems to me that the section does not affect him. The Provincial Insolvency Act takes special care to preserve the power of secured creditors to realise or otherwise deal with their securities, as may be seen from Ss. 28 (6) and 51 (2). The exemption from the operation of the section which must be understood to have been thus given to secured creditors must, in my opinion, be extended to money decree-holders who have obtained securities in the course of execution, as in the present case. It is conceded that S. 52 does not apply to mortgage decree-holders. In my opinion

3. (1916) I L R 38 A 327. 4. (1916) I L R 39 A 225.
7. (1919) I L R 42 A 158 : 38 M L J 502 (P C).

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nothing in that section affects the rights of money decree-holders who have obtained securities in respect of the property covered by such securities. They must also be treated as secured creditors for purposes of the section [*see also* S. 2 (*a*) and (*e*) of the Act]. The argument based on S. 52 must therefore be overruled.

In the result I agree with my learned brother that the order appealed against must be upheld and the appeal must be dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

V. Ranganatha Aiyar ... *Appellant** (*Plaintiff*)

v.

Srinivasa Aiyangar and others ... *Respondents* (*Defendants* 1, 3 *and* 4).

Ranganatha Aiyar v. Srinivasa Aiyangar.

Adverse possession—Interruption of—What amounts to—Attachment in execution of property held adversely to judgment-debtor—Effect—Symbolical possession—Effect as against persons not parties to suit or other proceeding in which such possession is given.

Attachment of property in execution of a decree does not arrest the running of time in favour of a party holding the property adversely to the judgment-debtor.

Property in the possession of the defendant adversely to a person was attached by the plaintiff in execution of a decree obtained by him against that person. On the date of the attachment the defendant had not acquired a prescriptive title to the property by adverse possession. He put in a claim to the property which was allowed; and thereupon the plaintiff instituted a suit under O. 21, R. 63, Civil Procedure Code. But by that time the defendant had acquired a title by adverse possession.

Held, that the attachment did not interrupt the adverse possession and that the suit was barred.

Per Odgers, J.—Symbolical possession is sufficient to interrupt adverse possession when the adverse possessor is a party to the suit or other proceeding in which symbolical possession is given; as regards persons who are not so parties only actual dispossession can interrupt their adverse possession.

Second Appeal against the decree of the District Court of East Tanjore at Negapatam in A. S. No. 6 of 1921 preferred against the decree of the Court of the Principal District Munsif of Tiruvalur in O. S. No. 367 of 1918.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for appellant.

S. T. Srinivasa Gopalachari for respondents.

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*S A No. 110 of 1922. 16th March, 1925.

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Phillips, J.

The Court delivered the following

JUDGMENTS :—*Phillips, J.* :—The suit house originally belonged to the 1st defendant's father Narayana Aiyangar and his brother, the 2nd defendant, Alagasinga Aiyangar. A partition was effected between the brothers in 1881, but not by metes and bounds. Narayana's share was sold to one Dikshitar on 1st May, 1905. Alagasinga's share was sold to the plaintiff on 10th March, 1906. On 30th March, 1906, Narayana's share was delivered to Dikshitar by symbolical delivery. On 25th March, 1907, Dikshitar sold his share to Alagasinga's son, the 3rd defendant. On 3rd July, 1917, the plaintiff attached Alagasinga's share in execution of a decree. On 4th March, 1918, Narayana put in a claim petition. On 10th June, 1918, the claim was allowed and on 19th August, 1918, the present suit was brought under O. 21, R. 63. Meanwhile, on 3rd April, 1918, Alagasinga had brought a suit to recover possession of his share, a suit which has been dismissed.

The Lower Courts have found that there has been adverse possession by Narayana's son, the 1st defendant, for twelve years before suit, and now in this second appeal two questions arise : (1) whether the attachment by the plaintiff on 3rd July, 1917, puts an end to the adverse possession of 1st defendant, namely, whether the possession of 1st defendant from that date till the suit was filed continued to be adverse and uninterrupted ; (2) whether the symbolical delivery of 30th March, 1906, put an end to the 1st defendant's adverse possession or not. The decree in which symbolical delivery was given was against Narayana alone and 1st defendant, his son, was not a party to it.

The first point has been expressly decided in *Seetharami Reddi* v. *Venku Reddi* (1). In that case the defendants had been in possession for less than twelve years at the time of attachment, but continued in possession until the suit was brought more than twelve years after their possession commenced. It was held in this Court that the attachment could not have the effect of arresting the running of time against defendants. If that ruling is adopted, it is clear that the plaintiff's suit is barred by limitation. But it is urged for the appellant that the decision in *Pandiyan Pillai* v. *Vellayappa Rowther* (2), is authority to the contrary, and this contention appears to have some force, for, in that case, the facts were very similar and it was decided against the parties claiming ad-

1. (1901) 11 M L J 344. 2. (1917) 33 M L J 316.

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verse possession. Reference is made in the judgment to *Seetharami Reddi* v. *Venku Reddi* (1) and it is not dissented from nor criticised in any way, apparently because it was held that no question of interruption of possession or of its continuance despite the attachment arose. Although, therefore, the decision appears to be in direct contravention of the decision in *Seetharami Reddi* v. *Venku Reddi* (1) it is based on other grounds, grounds which are not too clear, because in the judgment the facts do not appear to be correctly set out owing to the apparent transposition of the words "plaintiff" and "defendant" in two places. Reliance is also placed on *Vasudeo Atmaram Joshi* v. *Eknath Balkrishna Thite* (3), and that no doubt is an authority directly in favour of the appellant, for it was there held that in such a suit, namely, under S. 283 of the old Civil Procedure Code, it must be proved " that on the date of attachment which was subsequently raised by order of the Court on the application of the 1st respondent, their judgment-debtors had a subsisting right to the property." For this proposition *Harishankar Jebhai* v. *Naran Karsan* (4) is relied on, but a reference to the latter shows that in that case the date of the order on the claim petition was treated as the date on which the adverse possession ceased. If that date is taken in the present case, namely, 10th June, 1918, the plaintiff's suit is barred by limitation. This latter proposition is supported by the authority of the Calcutta High Court in *Phul Kumari* v. *Ghanshyam Misra* (5), where it was held that the order of the Court was the basis of the subsequent suit. We have not been referred to any other authority than *Vasudeo Atmaram Joshi* v. *Eknath Balkrishna Thite* (3), which is directly in point, and inasmuch as that case purports to be based on a prior decision which was not to the same effect, there is no argument in the judgment which goes to show that the decision in *Seetharami Reddi* v. *Venku Reddi* (1) is incorrect.

It is suggested that we should refer this point for the decision of a Full Bench, but I do not think it is necessary in view of the following circumstances. In the first place, the decision in *Seetharami Reddi* v. *Venku Reddi* (1) has never been dissented from, although it was given so long ago as 1901, and on the merits I respectfully agree with the conclusion. Attachment of immoveable property is effected by an order prohibiting the judgment-debtor from transferring or

1. (1901) 11 M L J 344.
3. (1910) I L R 35 B 79.
4. (1893) I L R 18 B 260.
5. (1907) I L R 35 C 202 (P C).

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charging the property in any way and all persons from taking any benefit from such transfer or charge. (O. 21, R. 54, Civil Procedure Code.) It has always been held that an attachment does not confer any interest in the property, and it is difficult to see how a mere attachment can disturb the continuance of physical possession of the holder at the time. There are many authorities for holding that adverse possession is not disturbed except by actual ouster. For instance in *Pankaj Mohan* v. *Bipin* (6) where the Court ordered the property to be put in possession of a Receiver, but possession was not actually given, it was held that possession was not disturbed. Again in *Singaravelu Mudaliar* v. *Chokkalinga Mudaliar* (7) it was held that a declaration that the party in possession had no title has not the effect of interrupting the continuity of his adverse possession. In *Subbaiya Pandaram* v. *Mahammad Mustapha Marcayar* (8) it was held that a decree which was not executed did not disturb possession. In view of these decisions it is difficult to hold that a mere attachment, under which possession is in no way disturbed, can affect the continuity of adverse possession. Appellant relies on two cases reported in *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (9) and *Sarat Chandra* v. *Bibhabati Debi* (10), but in both these cases the attachment was not one made under the Civil Procedure Code, but was made by a Magistrate in proceedings under Chap. XII of the Criminal Procedure Code and must be distinguished on the ground that an attachment under that Chapter implies an actual taking possession of the property by the Magistrate or by some one under his orders. I am therefore of the opinion that the decision in *Seetharami Reddi* v. *Venku Reddi* (1) is correct and see no necessity for referring the case to a Full Bench as there is no actual conflict of opinion in this Court. In this view it is unnecessary to decide the second point raised which was not raised in the Lower Courts. The appeal is accordingly dismissed with costs.

Odgers, J.

Odgers, J. :—Two points have been raised in this appeal :—(1) Is symbolical possession, *i. e.*, delivery by the Court of immoveable property in the execution of a decree sufficient to interrupt adverse possession? and (2) Does an

1. (1901) 11 M L J 344.
6. (1922) 38 C L J 223.
7. (1922) I L R 46 M 525 : 43 M L J 737.
8. (1923) I L R 46 M 751 : 45 M L J 588 (P C).
9. (1902) I L R 26 M 410.
10. (1921) 34 C L J 502.

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Odgers, J.

attachment of immoveable property serve to interrupt adverse possession ?

The plaintiff who brings the suit under O. 21, R. 63, after the disposal of a claim petition in favour of defendant's father pleads that since the 10th of March, 1906, the plaintiff's father and himself had been in possession of a moiety of the immoveable property in question and he brought the suit for a declaration that the other moiety belongs to the 3rd defendant or to defendants 2 to 4 and that it was liable to be attached in execution of the decree in O. S. No. 154 of 1912. The 1st defendant, who is the only contesting defendant, pleaded that he and his father had been in adverse possession to the plaintiff and the other defendants of the whole of the property in question for a period of over 25 years. The dates material to the points set out are:—On the 8th of June, 1881, there was a partition between the 1st defendant's father and his co-parcener Alagasinga of the property in question. On the 1st of May, 1905, there was a Court auction sale of the 1st defendant's share to one Dikshitar. On the 30th of March, 1906, there was symbolical delivery of 1st defendant's share to Dikshitar. On the 25th of March, 1907, there was a private sale by Dikshitar to the son of Alagasinga who was the 1st defendant's co-parcener above referred to and previously on the 10th of March, 1906, there was a private sale of Alagasinga's share to the plaintiff's father. On the 3rd of July, 1917, there was an attachment by the plaintiff of Alagasinga's share. On the 4th of March, 1918, there was a claim petition by the 1st defendant's father who was in possession. On the 3rd of April, 1918, the plaint in S. A. No. 109 was presented by Alagasinga. On the 10th of June, 1918, the claim of the 1st defendant was allowed and the attachment was raised ; and on the 19th of August, 1918, the plaint in the present second appeal was presented by the plaintiff.

It will be observed that both the plaints are more than 12 years from the date of the symbolical delivery of the plaintiff's share to Dikshitar but the attachment by the plaintiff on the 3rd of July, 1917, is within 12 years.

Now as to the first point reliance is placed by the appellant on the cases reported in *Kocherlakota Venkatakrishna Rao* v. *Vadrevu Venkappa* (11) and *Thakur Sri Radhakrishna* v. *Ram Bahadur* (12). In the first case it was held that the effect of symbolical delivery arises in the case of the judgment-

11. (1903) I L R 27 M 262. 12. (1917) 34 M L J 97 (P C).

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debtor himself absolute, but where the judgment-debtor is not the party in possession, adversely to a third party (as here), delivery made in the absence of that third party and not personally to him, cannot by itself affect his possession, not amount to an ouster or dispossession of him and his possession will continue uninterrupted; but if he was present and the delivery takes place adversely to the claim of such third party, it may be equally operative as against him. It was contended that the present case is the case of a stranger resisting the suit not of a stranger trying to recover as defendant No. 1 was not a party to the suit. In *Thakur Sri Radhakrishna* v. *Ram Bahadur* (12) it was held that symbolical possession will avail to dispossess defendants sufficiently because they were parties to the proceedings in which it was ordered and given. *Jugaobandhu Mukerji* v. *Ram Chandra Bysack* (13) is affirmed.

The case in *Jobeda Khatun* v. *Tulsi* (14) was also relied on. The learned Judges there say that the decisions show that symbolical possession does not in any way affect the possession of or give start to a fresh period of limitation against persons who are not parties to the suit or execution proceedings. The learned Judges refer to a Privy Council case reported in *Thakur Sri Radhakrishna* v. *Ram Bahadur* (12), where their Lordships say that " symbolical possession is sufficient to interrupt adverse possession when the adverse possessor is a party to the execution proceedings in which the symbolical possession is given; as regards persons not so parties, only actual dispossession can interrupt their adverse possession." This, in my opinion, is sufficient to dispose of the point adversely to the appellant, if we can assume that defendant No. 1 was no party to the execution proceedings.

A greater part, however, of the argument before us has been centred on the second point, viz., as to the effect of attachment as interrupting adverse possession, there being no doubt, as already pointed out, that on the date of the suit the period requisite to establish adverse possession had elapsed. It is said that there are two cases—neither of them reported in the authorised reports—on each side of the line.

For the appellant it is frankly admitted that the case reported in *Seetharami Reddi* v. *Venku Reddi* (1) is against his position. There the learned Judges distinctly and in so many words lay down that attachment could not have the effect

1. (1901) 11 M L J 344. 12. (1917) 34 M L J 97 (P C).
13. (1880) I L R 5 C 584 (F B). 14. (1922) 36 C L J 472.

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of arresting adverse possession by strangers holding adversely when the properties were attached by the plaintiff as belonging to certain of the defendants in the case against whom the strangers were holding. It is said that the case in *Pandiyan Pillai* v. *Vellayappa Rowther* (2) is diametrically opposed to this, and the headnote certainly gives some colour to this view. The learned Judges however dispose of the case in another manner. The decision in *Seetharami Reddi* v. *Venku Reddi* (1) was brought to their notice, but they merely remark : "An old decision of this Court, not reported in the authorised reports, namely, *Seetharami Reddi* v. *Venku Reddi* (1), supports Mr. Devadoss." They preferred to dispose of the case on a different ground, namely, "that a decision in a regular suit instituted to contest the order in the claim proceedings places the parties in *status quo ante* either by vacating the order made in the said execution proceedings or by confirming it. The result is the plaintiff is directed not to interpose obstacles in carrying out the further steps necessary to reap the fruits of the attachment. Both the parties are bound by that pronouncement, consequently no question of interruption of possession or of its continuance despite the attachment arises. So far from intending to overrule or disapprove of the decision in *Seetharami Reddi* v. *Venku Reddi* (1) it appears to me from this last sentence quoted from the judgment that the learned Judges held that the question did not arise. In my opinion, therefore, as far as authorities have been brought to our notice, the case in *Seetharami Reddi* v. *Venku Reddi* (1) stands uncontradicted. It is a case that has stood for over 23 years and it seems to me that it would be improper for us to decline to follow it unless there was some very cogent reason for doing so.

Now it has been constantly held that an adverse possession is a question of fact. It has been argued for the appellant that the nature of an attachment is such that on an attachment taking place the Court receives the properties into its custody and what this means may be seen by the form of attachment given in Appendix E, Form 24 of the Code of Civil Procedure. It only directs abstinence from transferring or charging the property by gift, sale or otherwise during the continuance of the attachment. It certainly does not physically interrupt the possession of persons already on the property and in my view it cannot be said even theoretically to do so. If it were

1. (1901) 11 M L J 344. 2. (1917) 33 M L J 316.

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allowed to interrupt any possession one can see that a wide door is open to fraud and oppression.

The case in *Vasudeo Atmaram Joshi* v. *Eknath Balkrishna Thite* (3) supports the appellant. That was a suit to establish the appellant's rights to sell the property in dispute as that of the judgment-debtors and it was held that the appellant must prove that on the date of the attachment, which was subsequently raised, the judgment-debtor had a subsisting right to the property; and that the suit must therefore be tried as if it were a suit for possession by the judgment-debtor. The learned Judges add: "So regarded, it is not the case here of the judgment-debtor having been dispossessed or having discontinued possession while in possession of the property." The learned Judges there specifically rely on *Harishankar Jebhai* v. *Naran Karsan* (4) where the critical date is taken to be that of the order of 11th August, 1908, which directed the removal of the attachment. That date corresponds to 10th June, 1918, in the present case and is inclusive of the present point; and that date is more than 12 years from 30th March, 1906. An old case in *Malraja* alias *Krishnama Rajah* v. *Narayanaswami Rajah* (15) lays down that the effect of an attachment does not change in any way the possession of the property so as to bring the case within the 12 years' limitation.

A further point was taken, namely, that the suit as allowed by O. 21, R. 63, although called a suit, was in fact nothing but a continuation of the claim proceedings; and the appellant relied on *Krishnappa Chetti* v. *Abdul Khader Sahib* (16). In that case the Privy Council decision in *Phul Kumari* v. *Ghanshyam Misra* (5) was referred to and in the opinion of Sadasiva Aiyar, J., such suits have not any of the essentials of original actions "but merely forms of appeal allowed by the Civil Procedure Code to be brought in the guise of original suits." This judgment of their Lordships has however been commented upon by a Full Bench of this Court in *Ramaswami Chettiar* v. *Mallappa Reddiar* (17) where Wallis, C. J. said: "The Privy Council no doubt referred in one place to the suit under S. 283 to establish the right of the unsuccessful party to the claim petition as an 'action of appeal' and to the plaint in such a suit as 'a plaint for review of a summary decision,' but this language must be read with

3. (1910) I L R 35 B 79. 4. (1893) I L R 18 B 260.
5. (1907) I L R 35 C 202 (P C). 15. (1869) 4 M H C R 281.
16. (1913) I L R 38 M 535 at 544: 26 M L J 449.
17. (1920) I L R 43 M 760 at 773: 39 M L J 550 (F B).

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reference to the question before them." Oldfield, J. in the same case points out that all their Lordships were concerned with was the question of Court-fee, in connection with which the character of the relief asked for by the plaintiff would be decisive.

For these reasons I am of opinion that attachment does not interrupt adverse possession or rather possession which is ripening into adverse possession. This second point also fails and that we must give effect to the decision in *Seetharami Reddi* v. *Venku Reddi* (1) above quoted. I agree with my learned brother that there being, in my opinion, good and sufficient authority against the proposition that adverse possession can be interrupted by attachment, there is no necessity for reference to a Full Bench. Consequently the second appeal must be dismissed with costs.

A. S. V. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER.

K. R. Radhakrishna Aiyar ... *Petitioner** (*Petitioner—Judgment-debtor*)

v.

Vinayakaswamiar (minor), by guardian T. A. Ramachandra Rao ... *Respondent* (*Respondent—Decree-holder*).

Radhakrishna Aiyar v. Vinayakaswamiar.

Execution of decree—Objection to, on ground of want of jurisdiction of Court which passed the decree to try the suit—Maintainability—Civil Procedure Code, S. 47—Effect.

A suit for rent under Madras Act I of 1908 was decreed *ex parte* against the petitioner. In proceedings taken to execute the decree the petitioner raised the objection that the Court which decreed the suit had no jurisdiction to try it.

Held, that the objection could not be entertained in execution proceedings.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the Sub-Collector, Kumbakonam, in E. P. No. 75 of 1924 in S. S. No. 1 of 1921.

N. S. Rangasami Aiyangar and *S. Rangaswami* for petitioner.

K. S. Sankara Aiyar for respondent.

The Court delivered the following

JUDGMENT :—An objection was raised to the execution of a decree in a suit for rent under Madras Act 1 of 1908 in

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*C R P No. 944 of 1924. 27th April, 1925.

1. (1901) 11 M L J 344.

which the petitioner did not appear and defend himself against the plaintiff's claim, the ground of the objection being that the Court had no jurisdiction to try the suit. The defence of want of jurisdiction is one that should have been raised at the trial of the suit itself. After the passing of the decree, the defendant's only course was to apply under O. 9, R. 13, Civil Procedure Code, to have the *ex parte* decree against him vacated and the suit re-heard. An objection to the jurisdiction of the Court that tried the suit is not one of the questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree which are allowed by S. 47. Civil Procedure Code, to be dealt with in execution [vide *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (1) and *Kalipada Sarkar* v. *Hari Mohan Dalal* (2).]. As the petitioner was in fact a party to the suit, though not represented at the trial, he cannot invoke the authority of the Privy Council decision in *Khiarajmal* v. *Daim* (3). The Revision Petition against the order of the Sub-Collector passed upon the decree-holder's execution petition is dismissed with costs.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

Sivaswami Aiyar ... *Appellant** (*Plaintiff*)

v.

Tirumudi Chettiar and others... *Respondents* (*Defts.* 1 *to* 4).

Will—Construction—Charity—Dedication to—Absolute dedication to charity —Gift to a person burdened with a trust to perform charity out of income— Words "Shall permanently enjoy" in will—Meaning.

The material portion of a will was as follows :—"Deducting these, the balance of 7 maha 25 kuzhies of nanja lands, my nephew Venkataraman shall permanently enjoy and with the income derived out of those lands and with the income of the interest of Rs. 500, the capital I have reserved for the purpose, the said Venkataraman is, as he likes, to be feeding at least ten Brahmins on each Dwadesi in his house at Mayavaram..... ....For ever, the said Venkataraman shall by himself get all these done, and, after him, Sivaswami, his younger brother, should conduct them."

The question for decision was whether the properties referred to in the will were constituted as trust for the purpose of the charity therein mentioned, or whether Venkataraman took the same as beneficial owner burdened with a trust to perform the said charity.

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*S A No. 401 of 1922. 12th February, 1925.

1. (1920) I L R 43 M 675 at 687 : 39 M L J 75 (F B)
2. (1916) I L R 44 C 627 at 633.
3. (1904) I L R 32 C 296 (P C).

Sivaswami Aiyar v. Tirumudi Chettiar.

Held, that the properties were not constituted as trust for the purpose of the charity but that Venkataraman took the same in fee simple burdened with a trust to perform the charity.

On the true construction of the will the whole income of the land was not necessarily to be devoted to the feeding, and, even if that were, there was no dedication of the *corpus.*

Meaning of the words "shall permanently enjoy."

Second Appeal against the decree of the Court of the Additional Subordinate Judge of East Tanjore at Mayavaram in A. S. No. 30 of 1921 preferred against the decree of the Court of the Additional District Munsif of Tiruvalur in O. S. No. 136 of 1919.

K. Bhashyam Aiyangar for appellant.

C. A. Seshagiri Sastri for respondents.

The Court delivered the following

JUDGMENT :—This was a suit for a declaration that a certain mortgage dated 14th December, 1903, executed by one Venkatarama Aiyar, deceased, in favour of one Sattayappa Chetti and the decree in O. S. No. 472 of 1916 on the file of the District Munsif's Court of Mayavaram obtained thereon were not binding on the trust properties and for an injunction restraining the defendants 1 to 3 from executing the said decree against the trust. It is contended that the plaint properties originally belonged to the plaintiff's maternal uncle Panchanadha Aiyar and that by his will, dated 8th January, 1898, he created a trust. This will is Ex. A in the case and its construction is the first point raised.

The 1st defendant contended *inter alia* that Venkatarama Aiyar got the properties as heir and not as trustee under the will, *i. e.*, that he took the properties as the beneficial owner burdened with a trust to perform the charity therein mentioned. The District Munsif gave the plaintiff the declaration that he asked for. On appeal to the Subordinate Judge, he held that the suit was barred by limitation under Art. 134 of the Limitation Act. In this he is clearly wrong, and it is agreed by both sides that the matter is concluded by the ruling in *Seetikutti* v. *Kunhi Pathumma* (1). On the construction of the will, both Courts held that the will is genuine and that the suit properties were not dedicated to charity but only the income thereof. Turning to Ex. A the words are :—

"Deducting these, the balance of 7 mahs 25 kulhies of nanja lands my nephew Venkataraman shall permanently enjoy and with the income derived

1. (1917) I L R 40 M 1040 : 32 M L J 520.

out of those lands and with the income of the interest of Rs. 500, the capital I have reserved for the purpose, the said Venkataraman is, as he likes, to be feeding at least ten Brahmins on each Dwadesi in his house at Mayavaram ... .For ever, the said Venkataraman shall by himself get all these done, and, after him, Sivaswami, his younger brother, should conduct them."

This is the important portion of Ex. A and I have had it re-translated by the Chief Interpreter and his translation is as follows :—

"Barring these, the remaining wet and dry lands measuring 7 mahs and 25 kulies, my sister's son Venkataraman shall enjoy permanently, and, with the income of the said land and with the interest derivable from the capital amount of Rs. 500 kept by me therefor, the said Venkatarama Aiyar shall, on every Dwadesi day, feed not less than ten Brahmins, in Mayavaram, at his own house, according to his pleasure."

In the last sentence the more accurate translation is : " For ever the said Venkatarama Aiyar having by himself got all these done, after him Sivaswami, his younger brother should conduct them." Mr. Bhashyam Aiyangar for the appellant points out that as there is no disposition of the surplus income in this case, that is a strong indication that the whole property was devoted to the trust and that the trust is not merely a charge. He quoted a number of cases, but they really all come down to this that each case must stand on its own footing and on the construction of its own document. He relied among other cases on *Vaithianatha Aiyar* v. *Thyagaraja Aiyar* (2) which laid down that gift of the whole income was equivalent to a gift of the corpus. But I am not satisfied that the whole income is necessarily to be devoted to the charity in this case. He has to feed not less than ten Brahmins in Mayavaram at his own house according to his pleasure. Supposing the income were insufficient to feed 20 or 30 Brahmins the trust would be adequately carried out by his feeding only ten. There would then be a surplus income which, as I construe Ex. A, would be his to do as he likes with as it is said that he shall permanently enjoy the nunja and punja lands. This is a will ; and in *Rajamanicka Chettiar* v. *Manickam Chettiar* (3) had occasion to examine the meaning of the word " enjoy " in a Hindu will. Of course, as I have already said, each case must stand on its own facts. But it seems to me that there is nothing in the document before me at present to restrict the word " enjoy " to either a life-estate in the lands or to the income thereof. I therefore think that the words " shall permanently enjoy " gave what in the English Law we would call a fee simple to

2. (1919) 41 M L J 20 at 29. 3. (1924) 47 M L J 725.

Sivaswami Aiyar v. Tirumudi Chettiar.

Venkatarama Aiyar. It is also to be observed that there is no disposition of the corpus after Venkataraman's death and after him Sivaswami, his younger brother, is only to conduct the charities. There is, to my mind, nothing to show, as I have pointed out above, that the whole income of the land is necessarily to be devoted to this feeding and even if this were so, I think the words do not mean a dedication of the corpus. Taking these points into consideration I am of opinion that the Subordinate Judge was right in coming to the conclusion that the properties were not constituted as trust for the purpose of the charity. No further question arises in this view of the case. I am therefore of opinion that the second appeal must fail and is accordingly dismissed with costs.

A. S. V. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Sigamani Pandithan ... *Appellant* (Plaintiff)*

v.

Munibadra Nainar and others... *Respondents (Defendants).*

Sigamani Pandithan v. Munibadra Nainar.

Limitation Act, Art. 116—Sale deed registered—Covenant for title and quiet enjoyment imported by S. 55 of the Transfer of Property Act into—Damages for breach of, with regard to a portion of the property conveyed—Suit for—Limitation—Starting point—Surrender of portion of property in plaintiff's possession and to which he got a good title—If a condition of his right to get decree for damages with regard to other half—Transfer of Property Act, S. 55 (2)—Covenant for title and quiet enjoyment imported by—Clause in sale deed excluding—What amounts to.

The plaintiff purchased some property from defendants 1 to 5 under a registered deed of sale. After the sale, a suit was brought by one *A* for half the share of the property on the ground that she was entitled to it as the heir of her deceased son. That suit was decreed by the First Court on 20th March, 1913. An appeal against that decree was decided on 13th April, 1914, and the second appeal was decided on 1st March, 1917. The plaintiff, who was not then in possession under the sale, sued for possession of the property, and he was given a decree for possession of half the property on 22nd December, 1915. On 10th November, 1917, the plaintiff then instituted the suit out of which the second appeal arose for damages for breach of the covenants of title in respect of the other half.

Held, (1) that the suit being one for compensation for breach of an express or implied covenant for title and quiet enjoyment in respect of a sale deed executed after the coming into force of the Transfer of Property Act, was governed by Art. 116 of the Limitation Act; (2) that the consideration for the sale failed

*S A No. 1638 of 1922. 24th April, 1925.

on 20th March, 1913, when the decree of the First Court in *A's* suit was given, and not on 1st March, 1917, the date of the decree of the second appeal therein; and (3) that it was not a condition of the plaintiff's right to obtain damages for breach of the covenants of title in respect of half of the property that he should surrender the other half to which he had a good title and of which he was in possession.

Held further, that a clause in the sale deed to the effect that the transferors had not created any encumbrance on the property had not the effect of excluding the statutory covenant as to title and quiet enjoyment embodied in S. 55 of the Transfer of Property Act.

The statutory covenants embodied in S. 55 (2) of the Transfer of Property Act are attached to the transaction of sale and not merely to the contract which precedes the sale.

Contracts which are contained in a sale deed or such terms of contract which the law imports into a sale are contracts within the meaning of Art 116 of the Limitation Act.

Second Appeal against the decree of the Court of the Subordinate Judge of Vellore in A. S. No. 31 of 1922 (A. S. No. 67 of 1921 on the file of the District Court of North Arcot) preferred against the decree of the Court of the District Munsif of Arni in O. S. No. 1043 of 1917.

N. S. Rangasami Aiyangar for appellant.

M. Patanjali Sastri for respondents.

The Court delivered the following

JUDGMENT :—The plaintiff purchased some property from defendants 1 to 3 under Ex. A. After the sale a suit was brought by one Ammani Ammal for half the share of the property on the ground that she was entitled to it as the heir of her deceased son. That suit was decreed by the 1st Court on 20th March, 1913. There was an appeal against the decree which was decided on 13th April, 1914 and the Second Appeal was decided on 1st March, 1917. The plaintiff who was not given possession under the sale sued for possession of the property and he was given a decree for possession of half the property on 22nd December, 1913. The present suit was filed on 10th November, 1917.

Mr. Patanjali Sastri, for the respondents, contends that the suit is barred by limitation. His contention is that either Art. 62 applies or Art. 97. Under Art. 97 of the Limitation Act a period of 3 years is given for bringing a suit for money paid upon an existing consideration which afterwards fails. The Subordinate Judge has not definitely held that Art. 116 applies. His view is that the matter was not finally disposed of till 1st March, 1917, when the Second Appeal was decided. This view of the law is wrong. The consideration for the

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sale failed when the decree of the First Court was given in Ammani Ammal's favour, i. e., on 20th March, 1913 [vide *Juscurn Boid* v. *Pirthichand Lal Choudhury* (1)].

The next question is whether Art. 116 applies. In this case the document is a registered document and the plaintiff got only half the property and he did not get a title to the other moiety. Mr. Patanjali Sastri's contention is that there was no covenant in writing for good title. He urges that the statutory covenants embodied in S. 55 (2) of the Transfer of Property Act should not be imported into the sale deed as S. 55 speaks only of a contract. I am unable to accept this contention. The statutory covenants are attached to the transaction of sale and not merely to the contract which precedes the sale. To hold that the statutory covenants under S. 55 apply only to contracts and not to sales would be defeating the object of S. 55. If the statutory covenants do not apply to the actual sale itself, the vendor who executes a sale deed is relieved of the liability which is cast upon him by the statute under S. 55. No doubt under the English conveyancing practice all the covenants of title and covenants for quiet enjoyment are set out in the deed itself, but under the Transfer of Property Act the technicalities of the English conveyancing have been done away with and in the case of a sale of property all the covenants which are usually found in an English conveyance deed are to be read into the sale deed by reason of the provision of the Transfer of Property Act. The contention of Mr. Patanjali Sastri is that Art. 116 speaks only of breach of contract in writing and does not apply to a sale deed. The sale itself may not be properly called a contract in writing but contracts which are to be contained in a sale deed or such terms of contract which the law imports into a sale are contracts within the meaning of Art. 116 and a sale deed comes within Art. 116 of the Limitation Act. It is unnecessary to discuss this matter further as a bench of this Court has, after a very careful consideration of the cases, come to the conclusion that a suit for compensation for breach of express or implied covenant for title and quiet enjoyment in respect of a sale deed executed after coming into force of the Transfer of Property Act is governed by Art. 116 of the Limitation Act. [*Arunachala* v. *Ramaswami* (2).] With the reasoning of the learned Judges I entirely agree and I hold therefore that Art. 116 applies to this case.

1. (1918) I L R 45 C 670 (P C). 2. (1914) I L R 38 M 1171 : 27 M L J 517.

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It is next contended by Mr. Patanjali Sastri that the document itself has by express terms made the statutory covenants as to title of quiet enjoyment inapplicable. I do not think the document is capable of that interpretation "இதில் எங்களால் கடன் இல்லை" are only capable of meaning that the transferors had not created any encumbrance on the property and this does not mean that the vendors had no title to convey. There is nothing therefore in this contention.

The Subordinate Judge accepted the contention of the appellant and has in the concluding portion of the judgment directed the plaintiff to surrender the moiety of the property in his possession before he could get the amount of consideration for the other moiety which he had lost. I do not see why the plaintiff should surrender the half to which he has got a good title when he sues for damages for breach of the covenants of title in respect of the other half. The Lower Court's decree should therefore be modified by deleting the portion of the decree as regards the surrender. The words to be omitted are "On plaintiff surrendering possession of the lands which he obtained in pursuance of the decree in O. S. No. 300 of 1912 on the file of the District Munsif's Court, Arni. on or before the 7th day of June, 1922."

As regards the amount payable to the plaintiff by the defendants both the vakils have consented to put in a statement. It is agreed by both parties that the amount payable to plaintiff is Rs. 702-4-7. The plaintiff will have interest at 6 per cent. from date of plaint. Para. 2 of the Lower Court's decree to be deleted. Parties will pay and receive proportionate costs throughout.

A. S. V. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

Yendluri Nagabhushanam (minor), by father and next friend Yendluri Chengayya ... *Appellant** (*Plaintiff*)

v.

Yendluri Jagannaikulu and others... *Respondents* (*Defts. Nos.* 1, 2 *and* 4).

Nagabhushanam v. Jagannaikulu.

Practice—Procedure—Judgment—Erroneous statement in, conclusive against a party—Procedure in case of—Review of judgment as soon as mistake is found out—Appeal on ground of such error.

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*S A No. 518 of 1922. 11th February, 1925.

Nagabhushanam v. Jagannaikulu.

Where a judgment contains a damaging statement against a party, a statement of an admission purporting to have been made by him, and practically conclusive of the case against him, the proper course for him to adopt, if his case is that the statement is erroneous, to apply for a review of judgment, when the matter is fresh in the mind both of the learned Judge who pronounced the judgment and of the practitioners who appeared in the case. He ought to do as soon as he finds out the mistake, and ought not to wait and make the error the ground of an appeal filed long afterwards.

Second Appeal against the decree of the District Court of Guntur in Appeals Nos. 68 and 69 of 1921 preferred against the decree of the Court of the 2nd Additional Subordinate Judge of Guntur in O. S. No. 60 of 1919 (O. S. No. 64 of 1919, Temporary Sub-Court, Guntur).

B. Somayya for appellant.

Ch. Raghava Rao and *A. Sundaram Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—This is an appeal from the District Court of Guntur in O. S. No. 60 of 1919 on the file of the 2nd Additional Subordinate Judge of Guntur.

The suit was brought by a minor (the plaintiff) for the recovery of certain jewels specified in the A Schedule and for the recovery of promissory notes eight in number specified in the B Schedule.

I have, in appeal, nothing to do with the jewels but only with 5 of the eight promissory notes. Three of the promissory notes have been found to belong to the 4th defendant Durgamma and in fact stand in her name. The other 5 do not stand in the name of the 4th defendant and the plaint asserts that the promissory notes were endorsed in favour of the 4th defendant by one Lakshmidevamma who died in 1919 having survived her husband who died in 1903. The plaintiff, a son adopted by Ramakrishnamma and Lakshmidevamma, was their heir after the death of the latter.

The written statement of the 1st defendant, who is the father and guardian of the 4th defendant, states: "The cash and jewels, etc., given to the 4th defendant by her father and her husband had been given away for interest by the said Lakshmidevamma and she was improving or increasing the same and getting pronotes at first executed in favour of the 4th defendant. When later on, they were to be executed again, she got the pronotes Nos. 6, 7 and 8 executed in favour of the 4th defendant." Now with regard to the other five, it is pleaded that consideration for them was either the jewels

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of the 4th defendant or the personal stridanam of Lakshmi-devamma and that they were duly endorsed in favour of the 1st defendant as guardian of the 4th defendant on 5th January, 1919.

On appeal to the District Judge, on this point, he held, although he did not believe, that consideration for the 5 promissory notes in question was provided from Durgamma's money, on the ground, that the practice of Lakshmidevamma seems to have been to keep her moneys and that of Durgamma separate, still, the reason, why Lakshmidevamma might have endorsed over the promissory notes to the 1st defendant was to enable him to find funds for getting a re-transfer of the properties sold by the 4th defendant's husband, who seems to have been a man of reckless character, for very much less than what they were worth.

Now Mr. Somayya, for the plaintiff-appellant, complains that there were no materials in the case set up by the plaintiff on which the District Judge could find as he did. But I think that a perusal of that portion of the written statement, paragraph 3, is sufficient to displace this argument as also reference to Issue III, "Whether the pronotes in Sch. B other than items 6, 7 and 8 were assigned to the 4th defendant? Is the assignment valid and binding on the plaintiff?" Both the alternatives set out in the written statement are discussed by the Subordinate Judge in paragraphs 29 and 30 of his judgment and therefore they must have been presented and argued before the Trial Court.

Secondly, there is a very important statement by the learned District Judge in para. 17 of his judgment, "It is conceded before me that if these assignments are found to be genuine, the plaintiff does not contest the validity of the assignments on the ground that the consideration for the promissory notes formed part of Ramakrishnamma's estate." Now this is a very important admission and in fact practically conclusive as regards the appellant's case. The hearing before the learned Judge was on the 8th October, 1921, judgment was pronounced on 9th November, the grounds of appeal were prepared on 17th April, 1922, and the second appeal was presented on the following day.

Now three affidavits have been filed by one side or the other as to the facts of this admission having been made. As I have said more than once, I very much deprecate having to decide on the trustworthiness of statements made on one side

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or the other by gentlemen of the bar. My training and my own feeling is to accept without reserve anything that is said by a gentleman in the position of a vakil. I say this in order to show my unwillingness to go into the matter which has been raised in these affidavits. The gentleman who appeared for the plaintiff in the hearing of the appeal was Mr. M. Kalidas, a High Court Vakil, while Mr. Seetapathi Rao appeared for the 3rd respondent and Mr. Nagabhushanam, pleader for the 1st respondent in A. S. No. 69 of 1921.

Mr. Kalidas was not present on all the days when the appeals were heard and therefore his statement that neither he nor the appellant's guardian made the admission in question may be safely accepted. Mr. Seethapathi Rao states that the admission was made by Mr. Nagabhushanam in reply to a pointed question by the Court during the hearing of the appeal when Mr. Kalidas was absent at Bapatla. Mr. Nagabhushanam states that he does not remember any such admission being made and he is perfectly certain that such admission could not have been made by him. In the face of this evidence I cannot say that the learned Judge's statement has been in any way shaken.

There is authority to which I have been referred, viz., *Madhusudan Chowdhri* v. *Chandrabati Chowdrain* (1) and other cases [*Sarat Chandra Maiti* v. *Bibhabati Debi* (2), *Mirza Shamsher Bahadur* v. *Munshi Kunj Behari Lal* (3), etc.] to show that what the appellant should have done as soon as he found such a damaging statement in the judgment of the learned Judge is this :—He should have asked the learned Judge for a review of his judgment, when the matter was fresh in the mind both of the learned Judge and the learned vakils and not have waited as he did for one year and nine months to get affidavits from gentlemen, one of whom did not remember anything about it. I think, therefore, that the admission must stand.

It seems to me that the other points raised by Mr. Somayya need not be dealt with by me. It is a little anomalous that the complaint should be now that the finger-print expert was not called for when the defendant wanted to call him, the application was opposed by the plaintiff. The same remark applies to Ex. S. The whole question discussed in para. 16 apparently goes to the credit of D. W. 3 who was

1. (1917) 6 L W 437 (P C). 2. (1921) 66 I C 433.
3. (1907) 5 M L T 212.

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cross-examined regarding the date of Ex. S. However, these two last points are questions of evidence and questions of fact and I am not disposed or entitled to go into them in second appeal.

I therefore think that the second appeal must be dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

Abdul Samad Khan Khiladar and another ... *Appellants** (*1st and 2nd defts.*)

v.

Bibijan *alias* Hanifa Khathu and others ... *Respondents* (*Plff. and Defts. Nos.* 3 *to* 10).

Abdul Samad Khan Khiladar v. Bibijan.

Tenants-in-common—Partition decree between—Agreement subsequent to, to continue as tenants-in-common as before—Registration of—Necessity—Fresh suit for partition—Maintainability—Muhammadan Law—Acquisition by one member of family—Self-acquisition or joint property of family—Trusts Act, Ss. 88, 90—Applicability.

One of the heirs of a deceased Muhammadan sued for a partition of his estate and obtained a decree, which was declaratory. She did not execute the decree, and it appeared that in spite of the decree there was an agreement between the co-sharers of the estate of the deceased to continue to hold the properties as tenants-in-common without division. In a fresh suit for partition instituted by the same person, *held,* that the said agreement was merely an agreement not to exercise the right of executing the decree in the prior suit and did not require to be registered under S. 17 of the Registration Act, and that the agreement must be regarded as a matter arising subsequent to the decree and as furnishing a fresh cause of action for the subsequent suit.

There is no provision in the Muhammadan Law that the acquisitions of the several members of a family are made for the benefit of the family jointly.

Under S. 88 of the Trusts Act the person to be held liable must be in a fiduciary position to protect the interests of another. There is no such relation between co-owners.

Under S. 90 of the Trusts Act a qualified owner gains an advantage in derogation of the rights of others interested in the property.

Second Appeal against the decree of the District Court of South Malabar in A. S. No. 13 of 1921 preferred against the decree of the Court of the Additional District Munsif of Palghat in O. S. No. 15 of 1920 (O. S. No. 496 of 1916 on the file of the Court of the Principal District Munsif of Palghat).

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* S. A. No. 358 of 1922. 3rd March, 1925.

Abdul Samad Khan Khiladar v. Bibijan.

C. V. Anantakrishna Aiyar for appellants.

K. V. Krishnaswami Aiyar (for the Advocate-General) and *D. A. Krishna Variar* for respondents.

The Court delivered the following

JUDGMENT :—This was a suit for the partition of the estate left by a Muhammadan named Ali Khan Khiladar who died in 1884. In 1896 defendant No. 3 sued for partition and obtained decree (Exs. I—IV). She did not execute the decree and one of the questions is whether she is competent to file a fresh partition suit. It is alleged that in spite of the previous decree there was an agreement between the co-sharers of the estate of Ali Khan (father of defendant No. 3) to continue to hold the properties as tenants-in-common without division. The District Munsif was satisfied that defendant No. 3 relied on " some such agreement " at the time the issues were framed in 1916 and found the agreement proved, and that defendant No. 3 was entitled to a share. The District Judge confirmed this finding but a point of want of registration was taken before him and the District Judge found that parties could orally agree to remain as tenants-in-common. This is the first point taken before me in second appeal. The former decree was declaratory though final and I think the agreement must be regarded as a matter arising subsequent to the decree and as furnishing a new cause of action, thus distinguishing this case from a subsequent suit on the same mortgage. [*Vedapuratti v. Vallabha Valia Raja* (1)]. It is argued for the respondents that, if the agreement were only a transaction recognising a title already subsisting, registration is not required. In *Ranganayaki Ammal* v. *Virupakshee Rao Naidu* (2) Coutts Trotter, J. quotes West, J. in *Sakharam Krishnaji* v. *Madan Krishnaji* (3) : " What requires registration is some document which brings about a definite change of legal relation to the property by an expression of will embodied in the document referred to. " So with regard to the word " declare, " the learned Judge conceives it to mean a declaration of will not a mere statement of fact. I take the question of the fact of the agreement to be proved and I also take it that what is found to have really happened was that the parties simply agreed to go on as before—they had been co-owners before the declaratory decree ; they agreed to ignore that and they continued to live as they had lived for years together, each

1. (1902) I L R 25 M 300 (F B). 2. (1923) 45 M L J 100.
3. (1881) I L R 5 B 232.

Abdul Samad Khan Khiladar v. Bibijan.

having title to a definite but undemarcated share of the property. Is this a matter requiring a registered deed? In *Venkata Reddi* v. *Kuppa Reddi* (4) the question was as to a Hindu co-parcenary and it was held that joint living and joint expenses, etc., would not convert originally separate property into property of the co-parcenary and that the transfer of the share to the co-parcenary should only be regarded as a gift to it, and therefore required a registered deed under the Transfer of Property Act. In *Thyalambal* v. *Krishna Pattar* (5) Srinivasa Aiyangar, J., found difficulty in understanding the conversion of individual property into joint family property except by way of transfers which presumably would require a registered deed. This, however, was clearly *obiter*. It has to be remembered that we are not now dealing with a joint Hindu family, but with Mahomedan co-sharers living together. There is thus no question of their status having become divided by the previous decree; they were never united or joint. A right to execute a decree does not apepar to be a right in or to immoveable property, but merely a right to apply for process of the Court in execution. It is, therefore, difficult to see how an agreement not to exercise that right can be said to fall within the meaning of S. 17, Registration Act. I am, therefore, of opinion that this agreement did not require registration and that the District Judge was right on this point.

The second point which was argued at length before me relates to Ex. XV. Defendants 1 and 2 contend that the acquisition under this document was made for their own benefit and with their own funds and that plaintiff and other heirs of Ali Khan Khiladar have no rights in it. The District Munsif upheld defendant 1 and defendant 2's contention as did the District Judge. The earliest document referred to on this point is Exhibit A, dated 8th February, 1893. Defendants 1 and 2 executed this *karar* to their elder brother, Hassan Ali Khan, who died in 1898. The younger brothers were to manage the common property for 18 years, and thus the arrangement came to an end early in 1911. The two other material documents on this question are Exs. XIII and XV. They are of the same date—26th July, 1915. Ex. XIII is a second mortgage effected by defendants 1 and 2 and the question is "Was it of their own shares alone or did they include the shares of the other heirs as well?" "If so, by what right?"

4. (1918) 8 L W 400. 5. (1915) 32 I C 955.

Abdul Samad Khan Khiladar v. Bibijan.

It must again be remembered that we have nothing to do with Hindu Law, with its joint family and powers of the manager to bind the other co-parceners, etc. *Prima facie* a Muhammadan dealing with property owned in common deals only with what he is entitled to deal with, viz., his own share [*Abdul Majeeth* v. *Krishnamachari* (6), *Sukur Mahamed* v. *Asmot Mandal* (7)]. Ex. XIII recites the debt due to the mortgagee under Ex. IX which was a family mortgage of 1899 "due by us." D. 1 and D. 2 no doubt refer here to the family. They stipulate that the mortgagee shall pay off the shares of certain females in all amounting to Rs. 6,000 and refer to the family debt on other accounts for Rs. 5,000. "The amount due under this deed by us to you for our family necessity is Rs. 11,000" and the mortgagors give possession of the 'said items' in the schedule which is para. 1 are said to "belong in jenm to us and are in our possession." They further agree that in default "our jenm rights in the schedule items should be sold" "out of us personally and out of our other properties." All this certainly strikes me as personal to the mortgagors; they happen to be borrowing from the same lender as advanced to the family under Ex. IX where the family were all parties and they refer to this family debt. Ex. XV is a release of their claim by the four females referred to in Ex. XIII, they have been paid off. It is executed to D. 1 and D. 2. If necessary this may be treated as a conveyance, *Duraiswami Pillai* v. *Chinnia Goundan* (8), though it is called a release. It is said (1) that the consideration for Ex. XIII did not proceed from D. 1 and D. 2. D. 1 in his evidence says it was the equity of redemption owned by the family which was dealt with under Ex. XIII; he does not say how he came to be authorised to deal with it. His evidence may mean that as there was a mortgage on the family property by the family, their individual shares in that equity of redemption were dealt with. It was of course an equity of redemption belonging to the family in which they (D. 1 and D. 2) owned definite shares. (2) The execution of Ex. XIII was benami for the family. I see no evidence of it. There is no provision in Muhammadan Law that the acquisitions of the several members are made for the benefit of the family jointly. *Hakim Khan* v. *Gool Khan* (9) and *Krishnajiban* v. *Masiuddin* (10). A co-tenant

6. (1916) I L R 40 M 243 : 32 M L J 195 (F B).
7. (1925) I L R 50 C 978.
8. (1918) M W N 89.
9. (1882) I L R 8 C 826.
10. (1921) 33 C L J 369.

is not a trustee for another co-tenant *Kennedy* v. *De Traford* (11) which has been followed by a Bench of this Court in O. S. Appeals Nos. 4 of 1897 and 7 of 1915. Nor is there any evidence of delegation. It was finally argued that accepting all these propositions of Muhammadan Law, Ss. 88 and 90 of the Trusts Act apply. In the former the person to be held liable must be in a fiduciary position to protect the interests of another. It has been pointed out that there is no such relation between co-owners. In the latter a qualified owner gains an advantage in derogation of the rights of others interested in the property. If D. 1 and D. 2 merely mortgaged their own shares, there is no question of interference with the rights of others. Lastly, it was argued that, treating Ex. XIII as the act of strangers to the family, it had been adopted subsequently by the others as their act and ratified under the ordinary law of contract. The mortgagee says he did not insist on the rest of the family joining in Ex. XIII as he thought the shares of D. 1 and D. 2 would suffice as security. There is no evidence that the family ever expressed a wish to join in or to adopt the action of D. 1 and D. 2 as their own. There is no finding on it either and the point seems to be taken for the first time here. I think both the Lower Courts were right in the conclusion they came to on this point which is raised by the Memorandum of Objections one by defendant 3 and the other by plaintiff together with defendants 4, 5, 7 and 8.

The Second Appeal is dismissed with costs and the two Memorandum of Objections which raise the same point are also dismissed with costs of defendants 1 and 2.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE RAMESAM.

Sourimuthu and others ... *Appellants* (Plaintiffs 1 to 3 and defendants 3 and 4)*

v.

Pavadai Pachia Pillai and another ... *Respondents (1st and 2nd defendants).*

Hindu Law—Joint family—Member of—Sale of specific items of family property—Suit by other member for recovery of his share in properties alienated, and decree in his favour therein—Subsequent suit by alienee for general partition

* S. A. No. 1704 of 1923. 24th July, 1925.

11. (1897) A C 180.

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and allotment to him of properties alienated, or, in the alternative, for allotment of other properties as substitute—Maintainability.

S, the father of the 1st defendant, died, after having sold the properties mentioned in the plaint Sch. I to the 1st plaintiff's father, the properties in Sch. II to the 4th defendant, and the properties in Sch. III to the 3rd defendant's predecessors-in-title. The properties mentioned in Sch. IV were not disposed of by him.

The 1st defendant, alleging that the abovementioned sales by his father were not binding on him, sued for partition and recovery of his share, and obtained a decree in that suit.

After the termination of the above litigation, the plaintiff, the alienees of the properties in Sch. I, instituted the suit out of which the appeal arose for a general partition of the properties of *S*. They alleged that the properties left undisposed of by him were enough to be allotted to the share which the 1st defendant was entitled to. They prayed in the first instance that the whole of the properties sold to them might be allotted to the share of *S* and through *S* to themselves and, in the alternative, they prayed for the allotment of other properties as substitute, if the Court held that the properties sold to them could not be allotted to them.

Held, that the plaintiffs were not entitled to their first prayer, but that they were entitled to the second.

So far as the particular property sold is concerned the former suit is final and makes the matter *res judicata*. The result of the decree in the former suit is that the plaintiff in that suit gets his share as his separate property, and does not hold it as joint family property.

As regards the second prayer, it was not in the plaintiffs' power to ask for a general partition in the former suit.

Second Appeal against the decree of the District Court of North Arcot at Vellore in A. S. No. 316 of 1921, preferred against the decree of the Court of the District Munsif of Tiruvannamalai in O. S. No. 388 of 1920.

K. Sankara Sastri for appellants.

N. Chandrasekhara Aiyar for respondents.

The judgment of the Court was delivered by

Ramesam, J.

Ramesam, J. :—The facts out of which this Second Appeal arises are not in dispute. One Subbaraya Pillai, father of 1st defendant, died in 1918. He sold the properties mentioned in the plaint Sch. I to the 1st plaintiff's father Roger on the 27th February, 1905, the properties mentioned in Sch. II to 4th defendant on 22nd May, 1902, and the properties in Sch. III to the predecessors-in-title of the present 3rd defendant on 21st May, 1901. The properties mentioned in Sch. IV were not disposed of by him. The present 1st defendant alleging that the sales mentioned above made by his father were not binding on him sued for partition and

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recovery of his share in O. S. No. 416 of 1916. He obtained a decree. That suit came up to the High Court in second appeal, and the decree in favour of the plaintiff was confirmed with some variations which are not now material. After the termination of the said litigation, the present plaintiffs, the sons of the alienee of the properties in Sch. I, have now sued for a general partition of the properties of Subbaraya. They allege that the properties left undisposed of by him were enough to be allotted to the share which the present 1st defendant is entitled to. They pray in the first instance that the whole of the properties sold to them may be allotted to the father's share and through the father to themselves, and in the alternative they pray for the allotment of other properties as substitute, if the Court holds that the properties sold to them and mentioned in Sch. I cannot be allotted to them. The District Munsif agreeing with the plaintiffs' contention gave a decree for the properties sold to them. On appeal the District Judge reversed the decree and dismissed the plaintiffs' suit on the ground that the suit as framed is not maintainable. He was of opinion that a suit for general partition by a stranger purchasing specific items of property from one of the members of a joint family should be filed before a suit by a non-alienating co-parcener for partition of the alienated item is filed and decreed, and would not be maintainable after the partial partition was decreed. In the result he dismissed the plaintiffs' suit. The plaintiffs appeal.

In second appeal the plaintiffs have urged their right to both the alternative prayers. The right of a purchaser to file a suit for general partition and to work out his rights and equities either by having the properties sold to him allotted to the share of the alienor or by getting other properties in substitution is not in dispute before us, and has been conceded on both sides. [Vide *Aiyyagari Venkata Ramayya* v. *Aiyyagari Ramayya* (1)]. The right of a non-alienating co-parcener to file a suit for partial partition and get a decree for his share is equally settled and must now be taken as established law. [Vide *Venkatachella Pillai* v. *Chinnayya Mudaliar* (2), *Subramanya Chettiar* v. *Padmanabha Chettiar* (3) and *Iburamsa Rowther* v. *Thiruvenkataswami Naick* (4)]. We must start from the basis that these decisions were correctly decided. If in a suit for partial partition the purchaser does not defend

1. (1902) I L R 25 M 690 (F B). 2. (1870) 5 M H C R 166
3. (1896) I L R 19 M 267. 4. (1910) I L R 34 M 269 : 20 M L J 743 (F B).

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the suit on the ground of his equity, or if his plea is disallowed, the decree must be regarded as final. It is true, as pointed out in *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal*(5), that it is competent for the Court to make the whole or any part of the relief granted in such a suit to the non-alienating coparcener conditional on his assenting to the results of a suit for general partition. In the present case no such equities were urged in the former second appeal. What was urged was that the purchaser was entitled to insist on the son suing for a general partition, not that he himself was entitled to sue for a general partition, and get the property allotted to his share and that the decree in that suit should be made conditional on the result of such a suit. Thus we have got the fact in this case that in the former suit no condition was added to the decree. In *Hanmandas Ramdayal* v. *Vallabhdas* (6) Batchelor and Kemp, JJ. added a reservation staying execution of the decree and giving three months to the defendant to file a suit for general partition. It practically amounted to making the decree conditional. The question that now arises is, what is the effect of the unconditional decree in the former suit ? We think that so far as the particular property is concerned, the former suit is final and makes the matter *res judicata* and the plaintiffs are not entitled to their first prayer. The result of the decree in the former suit is that the plaintiff in that suit gets his share as his separate property, and does not hold it as joint family property. The learned vakil for the appellants relies on two decisions. The first decision he relies on is *Subba Goundan* v *Krishnamachari* (7). In that case a non-alienating co-parcener sued not for partial partition but for possession of the property alienated on the ground that the sale was void. His suit was decreed. It was held that a suit for general partition by the purchaser was afterwards maintainable. It was pointed out by the learned Judges that it was not in the power of the defendant in the prior suit to convert the suit for possession into a suit for general partition. In so far as the suit for general partition beyond the specific properties sold is concerned, these observations are undoubtedly in favour of the appellants. But this case cannot be regarded as authority in their favour so far as the first prayer is concerned. The first suit in that case was a suit for possession and when the non-alienating co-parcener got a decree for the properties, it must

5. (1913) I L R 40 C 966 : 25 M L J 512 (P C).
6. (1918) I L R 43 B 17. 7. (1921) I L R 45 M 449 : 42 M L J 372.

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be taken that he obtained possession of the properties on behalf of the joint family; it cannot be said that he obtained it as his separate property. In the appeal before us the first suit was a suit for partial partition and, as we already observed, the 1st defendant obtained the property as his separate property. The second case relied on by the learned vakil for the appellants is *Davud Beevi Ammal* v. *Radhakrishna Aiyar* (8). The observations of Wallace, J. particularly are in their favour. These observations seem to be *obiter dicta;* for, on the facts of that case, the observations were not necessary. The suit for partial partition by the son was pending at the time when the suit for general partition was taken for consideration and decreed. Wallace, J. seems to have been of opinion that, where a non-alienating co-parcener obtained a decree in a suit for partial partition, he obtains the property as joint family property. This is indirectly to say that the decision in *Venkatachella Pillai* v. *Chinnayya Mudaliar* (2) and other cases allowing a suit for partial partition are erroneously decided. There is no purpose in a decree for partition if the only object of it is merely to get rid of the sale and not to divide the property by metes and bounds. So long as such a suit is permissible and the decree directs division of the property by metes and bounds, the result of the decree must be that the co-parcener gets his share as separate property. And as there is no condition or reservation attached to the former decree as was pointed out in *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal* (5) or as was done in *Hanmandas Ramdayal* v. *Vallabhdas* (6), that decree is final and cannot be re opened in another suit. It seems to us, therefore, the matter is *res judicata* so far as the property sold is concerned and the first part of the appellants' contention must therefore be disallowed.

Coming to the second prayer, it is obvious that all the authorities and the trend of the previous discussion go to show that the suit is maintainable. It was not in the plaintiffs' power to ask for a general partition in the former suit as was pointed out in *Subba Goundan* v. *Krishnamachari* (7). The learned vakil for the respondents does not support the District Judge's judgment on this point. The result is that the second appeal must be allowed, and the case remanded for disposal

2. (1870) 5 M H C R 166. 5. (1913) I L R 40 C 966 : 25 M L J 512 (P C). 6. (1918) I L R 43 B 17. 7. (1921) I L R 45 M 449 : 42 M L J 312. 8. (1922) 44 M L J 309.

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according to law in the light of the above observations. Appellants will have refund of their Court-fee on the appeal memorandum. We may say that we agree with the District Judge in thinking that the position of 3rd and 4th defendants is the same as that of the plaintiffs and they will be given a similar decree in this case. In the second appeal each party will bear his own costs.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

Viswanatha Mudali and another ... *Appellants** (*2nd and 3rd defendants*)

v.

Doraiswami Mudali and another ... *Respondents* (*Plaintiffs* 1 *and* 2).

Viswanatha Mudali v. Doraiswami Mudali.

Hindu Law—Inheritance—Dancing woman—Sons of—Legitimate male descendants of such sons—Right of inheritance between—Paternity of sons unknown—Sons not sons of one individual—Effect—Heritable blood—Condition of existence of—Same father if necessary.

The plaintiffs were the grandsons of one of the sons of a dancing woman. The last male owner of the suit properties was the great-grandson of another son of the said woman. The question for decision in the case was whether the plaintiffs could claim to have a reversionary right to the estate of the last male owner. The parentage of the sons was unknown, and it was also not known whether they were the sons of one individual. It appeared, however, that the two sons of the woman lived in caste and married wives according to the Hindu caste customs, and that their descendants, including the plaintiffs and the deceased, were legitimate.

Held, that there was heritable blood between the two sons of the woman and also between their legitimate male descendants, and that the plaintiffs could therefore claim a reversionary right to the estate of the deceased.

It is not necessary that, in order to heritable blood, inheritance should be traced through the father.

Appeal against the order of the District Court of North Arcot at Vellore in A. S. No. 244 of 1922 preferred against the decree of the Court of the District Munsif of Vellore in O. S. No. 257 of 1921.

L. A. Govindaraghava Aiyar for appellants.

A. C. Sampath Aiyangar for respondents.

The Court delivered the following

Devadoss, J.

JUDGMENTS :—*Devadoss, J.* :—The plaintiffs sue for a declaration that the sale of the plaint property in favour of

* C. M. A. No. 39 of 1924. 12th February, 1925.

Viswanatha Mudali v. Doraiswami Mudali.

Devadoss, J.

defendants 1 and 2 is not binding on them as they are the reversioners of one Murugesa Mudali. They claim to be the grandsons of Muthusami Mudali, the divided brother of Kachi Muniappa Mudali, whose great-grandson was the deceased Murugesa Mudali. The District Munsif held that Muthusami Mudali and Kachi Muniappa Mudali being the sons of a prostitute there was no heritable blood between them and the plaintiffs had no reversionary right to the estate of Murugesa Mudali and dismissed the suit. The Subordinate Judge has reversed the decree of the District Munsif holding that the plaintiffs are reversionary heirs to Murugesa Mudali and has remanded the suit for disposal on the merits. Defendants 1 and 2 have preferred this appeal.

Muthuswami Mudali and Kachi Muniappa Mudali were the sons of a dancing woman called Thanji Ammal. It is admitted that the plaintiffs are the legitimate grandsons of Muthuswami Mudali and that Murugesa Mudali was the legitimate great-grandson of Kachi Muniappa Mudali. The question for decision is, does the rule of collateral succession obtain among the legitimate descendants of the two sons of a dancing woman whose paternity is unknown. There is no authority on the point in the Hindu Law books. We have not been referred to any decision in which the question was raised or decided. The principle applicable to the present case has to be deduced from the texts of the Hindu Law books and some of the decided cases.

A good deal of the argument in this case was with reference to the rights and disabilities of the illegitimate sons of Sudras. It is well settled that the illegitimate son of a man belonging to the twice-born class cannot inherit to his putative father ; he has only a right to maintenance, but in the case of Sudras, the illegitimate son inherits to his father, his share being half of that of the legitimate son, and he takes the whole in certain circumstances. West & Buhler, 82, 194, 3rd Edition. Courts have gone to the length of holding that a man's legitimate grandson by an illegitimate son succeeds to him in preference to a divided brother on the theory of representation [*Ramalinga Muppan* v. *Pavadai Goundan* (1)]. It is unnecessary to consider in detail all the decisions that have been quoted at the bar with regard to the rights of illegitimate sons. It is a misnomer to call the son of a dancing woman whose paternity is unknown an illegitimate son. The illegiti-

1. (1901) I L R 25 M 519 : 11 M L J 399.

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mate son is one born out of wedlock, *i. e.*, no marriage was solemnized between the father and the mother. In the case of sons of prostitutes or dancing women the paternity is unknown and it is only an euphemism to call them illegitimate sons. In Roman Law they are called *Nullius-Filius*. Dancing women have their peculiar customs. Their status is recognised in Hindu society. Their customs have received the sanction of judicial decisions and the adoption of girls by them is recognised by law, and the daughters of dancing women inherit in preference to their sons.

The question in this case is what is the law which is applicable to the descendants of the sons of a dancing woman assuming that the parentage of the sons is unknown and that they are not the sons of one individual. In *Subbaratna Mudali* v. *Balakrishnaswami Naidu* (2) a Bench of this Court held that the male members of the dancing girl caste are Hindus and are usually governed by the Hindu Law and usage. At p. 208 the learned Judges observe :—

"All the women appear to have followed the profession of a prostitute. That members of this caste are Hindus is certain, though the ancient writers and their modern exponents find some difficulty in fixing them in one of the four castes ; but whether they belong to the Sudra or fourth caste or to a separate fifth caste is immaterial. That male members of this caste are usually governed by the Hindu Law and usage does not seem to have been questioned so also when female members marry and have children, as they sometimes do, their family relation is governed by the Hindu Law and presumably the ordinary Hindu Law of Inheritance will govern succession to their properties. At the same time their female children may remain unmarried and become professional *dasis* without any degradation or stigma attaching to them so long as they observe the caste customs."

This decision is consonant with reason.

The plaintiffs and the defendants in this case are Hindus, Hindus by religion, as well as by their customs and manners. If the Hindu Law is not applicable to them, what other law is applicable ? Though the Srutis and Smrithis are applicable only to the Aryans, yet the text-writers have extended the law to all the residents of India, and the Courts have applied the Hindu Law to all the races inhabiting this vast country in the absence of proof of any special or local custom. The Dravidians of Southern India who are of Turanian origin had settled in India long before the Aryans entered it. They had their own laws and customs which are prevalent even to-day. The Aryans when they settled in this part of India attempted to introduce their customs and laws but they were

2. (1917) 33 M L J 207.

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never completely successful. The laws relating to family relations and succession and inheritance laid down by Manu and the commentators like Yajnavalkya and Vignaneswara were never accepted as binding by all the people. It was the East India Company's Courts that held for the first time that the laws contained in the ancient Srutis and Smrithis were applicable to all Hindus in Southern India in the absence of any custom or customary law governing any class of people. Manu in order to extend the influence of the Aryans compendiously uses the term 'Sudras' to the people of this country who are not Aryans in the same way as the Europeans use the word "native" to all those who are not of European descent, and postulates that they are all Sudras who have fallen away from the high place once occupied by them in the Aryan polity as the following verses show : Chapter X, verse 43 : 'The following races of Kshatriyas by their omission of holy rites and by seeing no Brahmins have gradually sunk among men to the lowest of the four classes." Verse 44 : " Paundrakas, Oodras, Dravidas, Kambojas, Yavanas and Sakas ; Paradas, Pahlavas, Chinas, Kiratas Deradas and Chasas. " Verse 45 : " All those tribes of men who sprang from the mouth, the arm, the thigh and the foot of *Brahma* but who became outcastes by having neglected their duties are called *Dasyus* or plunderers, whether they speak the language of the Mlechchas or that of Aryans. " This attempt on the part of the law-giver Manu to extend the influence of the Aryans among the races who inhabited this land was always pushed in the direction of influencing their religion and the rules of succession. When the East India Company's Courts were established, the Judges took the law from the Pandits who naturally relied upon the texts of the ancient law-givers and commentators as authority for their opinion. In course of time the Courts have come to regard Manu and the commentators as authoritative exponents of the law applicable to all the inhabitants of this country who don't profess any distinctive faith like Muhammadanism or Christianity. The customary law was considered as an exception to that contained in the Srutis and Smrithis. Under the loose term " Hindu " all classes of people are brought within the pale of " Hindu Law " as expounded in the texts of the various Srutis and Smrithis and their commentators. It therefore follows that people who have been born in India and who are of the Hindu faith and whose customs and manners are those of Hindus are governed by the Hindu Law.

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In the case of a dancing woman or a Hindu prostitute, her religion is Hindu and her customs, manners and observances are Hindu, and her sons are Hindus and the Hindu Law therefore is applicable to them.

The caste and persuasion of the mother determine the rights of her son, if illegitimate. In *Lingappa Goundan* v. *Esudasan* (3) it was held that the illegitimate son of a Hindu by a Christian woman was not entitled to maintenance from the estate of his Hindu father. Benson and Bhashyam Aiyangar, JJ. observe at page 14 :—

> "The Hindu Law lays down certain rules for determining the caste of offspring of unions between parents belonging to different castes (amongst the four recognised main castes) and gives separate names to the mixed castes to which such offspring will belong. In all these cases the Dharma or religious rites applicable to the offspring are those prescribed for the mother's caste [*Brindavana* v. *Radhamani* (4)]. The plaintiff, therefore, cannot be regarded as a Hindu by birth, and he is therefore beyond the pale of, and not governed by, the Hindu Law. There is no text of Hindu Law under which an illegitimate son of a Hindu by a woman who is not a Hindu can claim maintenance, and in none of the reported cases has maintenance been ever awarded to an illegitimate son who was not a Hindu by birth."

With all due respect it is difficult to see why the illegitimate son of a Hindu is not a Hindu when follows the Hindu customs and manners. It is the Hindu father who is bound to support his illegitimate son and the mother's religion has nothing to do with his liability to maintain him. It is unnecessary to question the soundness of this decision in this case. The principle of the decision is the mother's religion determines the rights of her children. If the mother is a Hindu, the children are Hindus,and the Hindu Law therefore is applicable to them. In *Mayna Bai* v. *Uttaram* (5) the facts briefly are: One Hughes kept two married women as his concubines. One of them was a Gowda Brahmin. Two sons were born to the Brahmin woman and he bequeathed his property to the sons. One of the sons died and the other son claimed to succeed him. The Privy Council held that the illegitimate children of a Brahmin married woman born to a European father were to be considered as Hindus and their rights governed by that law. On the remand the Madras High Court held in *Mayna Bai* v. *Uttaram* (6) that the sons of an English man by a Brahmin woman living apart from her husband were Hindus and their rights were to be determined by the rights

3. (1903) I L R 27 M 13.
4. (1888) I L R 12 M 72 at 80.
5. (1861) 8 M I A 400.
6. (1864) 2 M H C R 196.

of the class of Hindus to which they belonged ; and they also held that they were to be regarded as Sudras or a class still lower, and in the absence of preferable heirs the two sons inherit the property of the mother and of one another. It was not possible to plead any custom in support of the claim. The learned Judges observed at page 203 :—

> "Our reasoning, therefore, is that there is no authority against the existence of heritable blood between the woman and her illegitimate offspring. Taukuram and his brother are decided to be Hindus. They are the Hindu sons of a woman who was either a woman of a class lower than the fourth of Manu's classes, and in this case sons are cognate to her and to one another, as the children of a class not twice-born out of wedlock, and entitled to inherit to their mother, and only not capable of inheriting to their father, because he is not a Hindu at all. If not so, she is a mere prostitute, and of the cognation between her and her offspring there exists no doubt whatever."

They relied upon the Roman Law which recognised the relationship between an erring mother and her sons and of the sons towards one another. It was the influence of Christianity in the West that stood in the way of the claim of an illegitimate son on his putative father. The principle deducible from these decisions is that if the mother is a Hindu and the children follow the Hindu religion and adopt Hindu manners and customs, the law applicable to them is the Hindu Law and it does not matter whether the father is a Christian or Muhammadan, European or an Indian. It necessarily follows that persons whose paternity is unknown and who are the descendants of Hindu mothers are governed by the Hindu Law.

In a recent case the Patna High Court held that the sons of the daughters of Hindus of the Naick caste who were converted to Muhammadanism but who lived with their Hindu grand parents and were brought up as Hindus are governed by the Hindu Law even though they have adopted the profession of dancing and have become prostitutes. Jwala Prasad, J., after an exhaustive consideration of the texts contained in the Srutis and Smrithis relating to the point and the decided cases bearing on the point has come to the conclusion that the sons of the prostitutes converted to Muhammadanism who were brought up by the Hindu grand parents as Hindus are governed by the Hindu Law. It follows from this decision that the Hindu Law is the proper law which governs the relations and the inheritance of persons who are Hindus in faith and customs and manners. Though it is stated that a Hindu is born and not made yet when the question is what is the law

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applicable to persons who are Hindus in fact, the only answer is that the ordinary Hindu Law is applicable and if the ordinary Hindu Law is applicable, unless there is some prohibition, statutory or otherwise, the whole of that law is applicable. In this case supposing Muniappa Mudali had died without issue and the widow alienated his property improperly would not Muthusami Mudali, if he survived Muniappa, be entitled to bring a suit that the alienation was not binding on him as reversioner? If Muthusami Mudali could bring such a suit, could not his son bring such a suit? And if he could, his legitimate descendants can certainly bring such a suit. It is consonant with reason and principle that, when a particular system of law is made applicable to a set of persons, the whole of that system should be applied and not portions of it, unless any custom valid and binding is proved to the contrary, or else, the application of that system is modified either by statute or by anything contained in the rules of that system.

From the decisions in *Mayna Bai* v. *Uttaram* (5) and (6) it is clear that Muthuswami Mudali and Kachi Muniappa Mudali had heritable blood between them. This is not seriously disputed by the appellant. The question is whether their descendants can inherit to one another; in other words, whether the principle of collateral succession applies to the descendants of these two persons. The contention of Mr. Govindaraghava Aiyar for the appellant is that collateral relationship is traceable only through the father; in other words, it is only in the case of agnatic relations the principle of collateral succession is applicable, that an illegitimate son cannot inherit to his father's collateral relations and that in the case of Muniappa Mudali and Muthusami Mudali, the father being unknown, agnatic relationship does not exist and therefore there can be no collateral succession among their descendants. Reliance is placed on the following cases in support of the appellants' contention. Amongst the Sudras governed by Mitakshara an illegitimate son cannot inherit collaterally in preference to legitimate heirs. *Ravji valad Mahadu* v. *Sakuji valad Kaloji* (7). Amongst Sudras governed by Mitakshara an illegitimate son does not inherit collaterally to the legitimate son by the same father. *Shome Shankar Rajendra Varere* v. *Rajesar Swami Jangam* (8). The illegitimate son is under Hindu Law excluded from all

5. (1861) 8 M I A 400.
6. (1864) 2 M H C R 196.
7. (1909) I L R 34 B 321.
8. (1898) I L R 21 A 99.

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collateral succession [*Dharma Lakshman* v. *Sakharam Ramjirao* (9).]. The son of the legitimate son of a Sudra could not inherit to his illegitimate son [*Zipru* v. *Bomtya* (10)]. It is well settled that an illegitimate son cannot claim to inherit to his father's collaterals. He cannot claim to succeed to the legitimate son of his father but can succeed only to his father and the father can succeed to him. The relationship is therefore only between an illegitimate son and his father. In *Subramania Aiyar* v. *Ratnavelu Chetty* (11) it was held that the father was entitled to succeed to his illegitimate son who left no issue, widow or mother. In all the cases where the illegitimate son was denied the right to succeed to his father's collateral relations the following text of Manu was relied upon: "The son of a young woman unmarried, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a Sudra are the six kinsmen but no heirs to collaterals." *Manu*, Chapter IX, verse 160.

But for this text, the illegitimate son would have the right to succeed to his father's collaterals. The question of succession to the putative father's collaterals does not arise here and the cases noticed above have therefore no application to the present case.

In the time of Manu a woman was allowed to marry more than once as is clear from Manu, Chapter IX, verse 191. The sons of a mother though by different fathers were considered to have heritable blood between them, for Nanda Panditha gives the order of precedence among brothers and sisters of whole-blood and half-blood thus : (1) Brothers of the whole-blood ; (2) sisters of the whole-blood ; (3) sons of the same father by different mothers ; and (4) sons of the same mother by different fathers. The existence of heritable blood between sons of the same mother by different fathers cannot therefore be through the father and is attributable only to their being sons of the same mother. It is not therefore necessary that in order to have heritable blood, inheritance should be traced through the father. It logically follows that the sons of a dancing woman or a prostitute have heritable blood between them.

If *A* can succeed to *B* in the absence of preferable heirs, why should not *A's* legitimate son succeed to *B* if *A* predeceases *B*, in the absence of law or custom to the contrary ? If two

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9. (1919) I L R 44 B 185. 10. (1921) I L R 46 B 424.
11. (1917) I L R 41 M 44 : 33 M L J 224 (F B).

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men are sons of the same mother, they have heritable blood between them; and if they have heritable blood between them, their descendants also have heritable blood between them unless such a principle is opposed to any distinct text either in Manu or in the Mitakshara or in any one of the various commentaries. There is no text of Manu or any of his commentators against the descendants of the sons of a prostitute having heritable blood between them. Both Muthuswami Mudali and Kachi Muniappa Mudali were brothers and their descendants are all legitimate, *i. e.*, the plaintiffs are the legitimate sons of the legitimate son of Muthusami Mudali, similarly Murugesa Mudali was legitimate in descent from Kachi Muniappa Mudali. There was no *bar sinister* so far as he, or his father, or his grandfather was concerned. Seeing that there was heritable blood between Muthusami Mudali and Muniappa Mudali, did the tie cease to exist between Muthusami's son and Muniappa's son? If there was heritable blood between the fathers, it is difficult to understand why that should not continue in the case of the sons. If Muthusami Mudali could succeed to Kachi Muniappa it is difficult to see why the legitimate son of Muthusami should not succeed to Kachi Muniappa. The principle of representation as enunciated in *Ramalinga Muppan* v. *Pavadai Goundan* (1) is against the appellants' contention. In that case it was held that the legitimate son was entitled to succeed to a man in preference to his divided brother.

Bhashyam Aiyangar, J., who delivered the judgment in the case, observed with regard to *Krishnayyan* v. *Muttusami* (12), *Ranoji* v. *Kandoji* (13) and *Parvathi* v. *Thirumalai* (14) :—"The effect of these decisions is that it is only when the father dies a separated householder that an illegitimate son is entitled to inherit to his separate estate, but that when the father dies an 'avibhakta' (undivided from his brothers or other collaterals) he is entitled only to maintenance." The principle of these decisions is explained as follows in *Thangam Pillai* v. *Suppa Pillai* (15) : "But these decisions proceeded on the view that he had no claim by survivorship against his father's co-parceners by *jus representationis*, and that he was neither a co-heir with his father nor a *sapinda* in relation to his father's co-parceners." The learned

1. (1901) I L R 25 M 519 : 11 M L J 399.
12. (1883) I L R 7 M 407.
13. (1885) I L R 8 M 557.
14. (1887) I L R 10 M 334.
15. (1888) I L R 12 M 401.

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Judge goes on to observe at page 523 : " Assuming, as explained in *Thangam Pillai* v. *Suppa Pillai* (15), that by reason of his illegitimacy an illegitimate son cannot claim his father's share as against his father's co-parcener by *jus representationis*, that principle will not be applicable to a legitimate son representing his father though the father was the illegitimate son of the grandfather. If a Sudra dies leaving a legitimate son and a grandson or great-grandson by a predeceased illegitimate son, can it be contended that the legitimate son is not bound to allow half a share to the son or grandson of his deceased illegitimate brother just as he would be if the illegitimate son did not predecease the father ? If the grandson as representing his father though not claiming under him would be entitled as against his uncle to claim his father's share, it can hardly be maintained though his father predeceased the grandfather, that he cannot claim the grandfather's estate as against the grandfather's divided brother. An illegitimate son's right of inheritance to his father's property, or at least to a part of it, is not contingent but absolute, as in the case of a legitimate son, since if he has legitimate half-brothers or other heirs of his father down to a daughter's son he gets a half share and in the absence of such heir, the whole estate. The Sudra's illegitimate son is therefore in a position more analogous to that of a legitimate son than to that of other relations whose right of inheritance is liable to obstruction. The principles, therefore, applicable to the succession of sons and grandsons of legitimate sons may by analogy be applied to the sons and grandsons of an illegitimate son, viz., that they should be considered capable of representing the illegitimate son and in case he dies before his father, of taking the share which would have fallen to him if he had not so died." The learned Judge relies for his opinion upon West and Buhler, 3rd Edition, pp. 72, 82, 83, 390 and Mr. Jolly's work on Hindu Law, pp. 185,186. I respectfully adopt the reasoning of that very learned Judge, and I am of opinion that the legitimate descendants of Muthusami Mudali represent Muthusami Mudali and the legitimate descendants of Muniappa Mudali represent Muniappa Mudali.

If Muniappa Mudali's son had died without issue would not Muthusami Mudali, if he was alive, have succeeded to the property of that son ? and if it is once granted that Muthusami's son represents him and Muniappa's son represents him, then it is difficult to understand how their sons could not represent

15. (1888) I L R 12 M 401.

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Muthusami and Muniappa respectively. If that is so, then there is heritable blood between them and one line can succeed to the other line according to the principle of collateral succession. It is immaterial to consider whether Thanji was a dancing woman or only a prostitute. Whether the mother be a dancing woman or an ordinary prostitute, the legitimate descendants of her sons have heritable blood between them and this decision does not turn upon any custom or law peculiar to dancing women.

On a careful consideration of the cases quoted at the bar and the various passages in the Hindu Law books touching on this point I have come to the conclusion that the plaintiffs are the reversionary heirs to Murugesa Mudali.

The appeal is dismissed with costs.

Wallace, J.

Wallace, J. :—I am of the same opinion. It appears to me that on the plaintiffs' own case the mother of the two brothers was of the dancing girl caste. Both P. W.s 1 and 3 state that this woman was a dancing girl and had no fixed husband. She was not therefore a married woman who had fallen from lawful wedlock. The law first of all to be applied is the law founded on usage which governs inheritance to women of the dancing girl caste, the paternity of whose children is unknown and is not a fact for consideration at all.

So far as appears further from the evidence these two brothers lived in caste, married wives according to the Hindu caste customs and had legitimate offspring.

Authority regarding the law of succession of *natural* offspring of a dancing girl there is, so far as I can find, none. Though a recent case in *Guddati Reddi Obala* v. *Ganapati Kandanna* (16) lays down that the degraded married woman is not for purposes of the law of succession in the position of a dancing girl, I do not think it is incorrect to say that, if the natural sons of such women take their place in Hindu society as respectable members of such and live as caste Hindus following the laws and customs of such, they must be taken as having adopted the usages and customs of the Hindu people with whom they associate. It does not appear to have been pleaded in this case that the law of succession on male offspring of a dancing girl differed in essence from the law of succession of the male offspring of a degraded married woman and in fact both sides proceeded on the footing that the law

16. (1912) 23 M L J 495.

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was much the same. I may take it then, without wasting time by further remand of the case, that the usage and customs of succession to their mother and *inter se* of male offspring of a dancing girl are those of such succession of the male illegitimate offspring of a degraded married woman. It may also be taken as not in question that such male offspring will not belong to any of the three higher castes, whatever their paternity may have been, and that if they are in caste at all, they must be in the Sudra caste.

I do not think that the *placita* from various ancient texts really assist this case because they are not in my opinion dealing with the rights of succession or inheritance in favour of *illegitimate* children at all, except in the case of the illegitimate son of a Sudra ; that is, in these texts 'son' means a legitimate son and 'daughter ' means a legitimate daughter. This applies even to the passage from Nanda Panditha quoted at p. 207 of Jolly's Hindu Law (1885 Edition). Illegitimate children have no place in Hindu Law when they are legitimate heirs except in the special case already referred to [see *Meenakshi* v. *Muniandi Panikkan* (17).]. I also find very few of the cases cited before us of any real help since this is not a contest between an illegitimate offspring and a legitimate, or a case of a claim by an illegitimate offspring to succeed to his putative father's collaterals. The question is purely whether two illegitimate sons of the same mother have between them heritable blood. The rule laid down in *Mayna Bai* v. *Uttaram* (6) that the children of a prostitute, when the contest is purely between themselves, succeed to the property of their mother and to one another, is, I think, the rule to be followed in this case. As I read that case, the principle did not in the slightest degree depend either on the fact that the father was known or on the fact that the father of both illegitimate sons was the same person. It rested not on the common paternity, but on the common maternity of illegitimate sons. [*Cf.* also the *ratio decidendi* of *Lingappa Goundan* v. *Esudasan* (3)] that principle in this narrow form has never, so far as I can ascertain, been challenged in succeeding cases, and it is also in my opinion reasonable and equitable and in consonance with the general spirit of if not prescribed by the letter of the law of the Mitakshara, wherein heritability follows propinquity of blood and *sapinda* relationship is determined by the possession of

3. (1903) I L R 27 M 13. 6. (1864) 2 M H C R 196.
17. (1914) I L R 38 M 1144 : 27 M L J 353.

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particles of the same body, whether father's or mother's (*see* Mitakshara quoted by Setlur in his Hindu Texts, 1911 Edition, Appendix A, page 543) and the view of Sadasiva Aiyar, J. in his Letter of Reference in *Subramania Aiyar* v. *Ratnavelu Chetty* (11). I do not think that there is any authority in Madras for the proposition that *sapinda* relationship cannot exist without a father.

The only reported cases which I can find of contest between illegitimate children *inter se* are *Mayna Bai* v. *Uttaram* (6), I already dealt with and *Arunagiri Mudali* v. *Ranganayaki Ammal* (18), in which latter case neither side appears to have raised any general contention that the Hindu Law principle which gives preference to daughters over sons as heirs of their mother could not be applied because Hindu Law generally could not be applied to the case.

I think the net result of the authorities and the case-law is this, that Hindu Law Texts have no application to illegitimate children except in the case of the illegitimate son of a known Sudra father, that so far as the H. Law canon goes illegitimate children have no right of succession to either parent, but that the general principles of Hindu Law will be applied to such a case unless such application would violate equity and good conscience and that, applying these, the Courts will hold that illegitimate children *inter se,* when there is no contest between them and legitimate children, inherit to their mother and to one another.

The next step is more difficult if the Court holds that outside Hindu Law there is heritable blood between any two illegitimate children, will that heritability carry with it all the adjuncts of heritability under Hindu Law, so that the legitimate male descendants of one branch can claim as reversioners to oust legitimate widows and legitimate descendants of the other branch ? That is the point now before us. In essence the case *Arunagiri Mudali* v. *Ranganayaki Ammal* (18) has approved of that principle, although the general question does not appear to have been then argued at all. But it was there taken for granted that Hindu Law principles would be extended to the illegitimate children of a Hindu woman. In *Mayna Bai* v. *Uttaram* (6), as I read it, it was clearly laid down that the illegitimate children of a Hindu mother are to be considered to be Hindus to whom Hindu Law, so far as

6. (1864) 2 M H C R 196.
11. (1917) I L R 41 M 44 at 50 : 33 M L J 224 (F B).
18. (1897) I L R 21 M 40.

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Wallace, J.

it can be analogically applied, will be applied and it is not open, unless and until special custom to the contrary is proved, for persons who are in the eye of the law Hindus to plead that the ordinary adjunct of the principle of Hindu Law, for example, that of the restricted nature of the estate taken by a widow from the last male owner, do not apply, or that they are entitled to set up new rights of succession and inheritance not known to Hindu Law. I cannot see that such an analogical application of Hindu Law to persons living as Hindus and following Hindu customs and usages can in any way offend the general principles of equity and good conscience. I hold therefore that the legal principles to be applied are those set out above.

It is not denied before us that these parties are, so far as they can, conforming to the Hindu Law governing their neighbours, that, for example, their wives were legitimately married to them according to the forms of Hindu Law, and that their wives derive their status as lawful wives and their children their status as lawful children from the fact that their families are conforming to the general usages and customs of Hindus. No special custom derogating from the applicability of Hindu Law principles to the descendants of these two illegitimate brothers has been pleaded or proved in the case. It follows in my view that the ordinary principles of Hindu Law should be applied to them. That the Lower Court has done. My opinion therefore is that the decision of the Lower Court is correct and I agree that this appeal be dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

M. A. R. R. M. P. Muthu Veerappa Chettiar ... *Appellant** (*Petitioner-Creditor*)

v.

U. K. Sivagurunatha Pillai ... *Respondent* (*Debtor-Respondent*)

Muthu Veerappa Chettiar v. Sivagurunatha Pillai.

Insolvency—Joint Hindu family—Debts of father—Son if can be adjudicated insolvent.

The relation of creditor and debtor exists between a lender and the members of a joint Hindu family in respect of debts incurred by the family, and

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*A A O No. 369 of 1924. 3rd September, 1925.

Muthu Veerappa Chettiar v. Sivagurunatha Pillai.

hence an undivided Hindu son can be adjudicated insolvent in respect of a debt incurred by his father for the family.

Appeal against the order of the District Court of Coimbatore, dated the 28th August, 1924, in I. P. No. 43 of 1924.

M. Patanjali Sastri for appellant.

T. R. Ramachandra Aiyar, P. Balakrishna Menon and *S. Srinivasa Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—This is an appeal against the order of the District Judge of Coimbatore dismissing the appellant's application to adjudicate the respondent an insolvent. The learned Judge dismissed the application on the ground that the respondent should not be adjudicated in respect of his father's debt, as there was no personal liability on the part of the respondent in respect of such debt. The petitioner in his petition alleged that the respondent was pressed to pay the debt due to him and he requested the petitioner to give him time to collect the outstandings and pay him. Taking advantage of the time given to him he made certain alienations in favour of certain creditors which the petitioner alleges to be fraudulent preferences. There is nothing in the Insolvency Act which prevents the undivided members of a joint Hindu family from being adjudicated insolvents in respect of debts due by the family. Each case would depend upon its circumstances. If the petitioner makes the necessary allegations and proves them, then the Court would be justified in adjudging the members of a joint family insolvents. In the case of a joint Hindu family, if the father incurs debts and dies, the other members of the family do not stand in the relation of heirs ; they only succeed to him and the debts are binding upon them. It was laid down by a Bench of this Court in *V. S. Rm. Chokalingam Chettiar and another* v. *Thiruvenkataswami Naidu* (1) that the relation of creditor and debtor existed between the lender and the members of a joint family in respect of debts incurred by the family. That being so, there was no reason why the Lower Court should not have enquired into the matter and disposed of the petition on the merits. We therefore set aside the order and direct the District Judge to restore the petition to file and dispose of it according to the provisions of S. 24 of the Provincial Insolvency Act. Costs will abide the result.

T. S. V. *Case remanded.*

1. C M A No. 47 of 1916.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Tharamal Parkam Kalpathoor Thulicha Puthiatuth Sankaran Nair ... *Petitioner** (*Petitioner*)

v.

Uruppoyil Ambu and others ... *Respondents* (*Respondents*).

Sankaran Nair *v.* Ambu.

Civil Procedure Code, O. 21, Rr. 13, 17—Execution application—Attachment of immoveable properties prayed for—List of properties not filed—List filed at a time when decree barred—Order dismissing petition—If amounts to a refusal of jurisdiction—Interference in revision.

An application to execute a decree, dated 7th March, 1910, was filed on 28th February, 1922, and the relief asked for was the attachment of immoveable properties. The description of the properties as required by O. 21, R. 13, was not given in the petition, but was promised to be furnished later. The list was filed only on 5th April, 1922, more than twelve years after the date of the decree. The executing Court dismissed the application as time-barred. *Held,* the Court had an option under O. 21, R. 17, either to reject the application as originally presented or to allow the defect to be remedied within a time to be fixed by it. Declining to pass such a remedial order did not amount to a refusal of jurisdiction ; and as no order had been passed under O. 21, R. 17 (1) allowing the defect to be remedied within a time fixed by the Court, the execution application could date only from the time when it fully conformed to O. 21, R. 13, and that being the 5th April, 1922, the decree was barred. *Vemuri Pitchayya* v. *Rajah Yarlagadda Ankineedu,* (1923) 45 M L J 651 and *Asgar Ali* v. *Troilokya Nath Ghose,* (1890) I L R 17 C 631 (F B) referred to.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif of Payoli, dated the 15th March, 1923, in R. E. P. No. 182 of 1922 in S. C. S. No. 229 of 1910.

R. Govinda Menon for petitioner.

K. P. Ramakrishna Aiyar for respondents.

The Court delivered the following

JUDGMENT :—Petitioner seeks to revise the order of the District Munsif of Payoli in R. E. P. No. 182 of 1922 in S. C. S. No. 229 of 1910.

Petitioner obtained a decree on 7th March, 1910. On 28th February, 1922, he applied for attachment promising to furnish a list of immoveables. The application was adjourned from time to time till July, 1922, for the appointment of a guardian and then again from time to time till 15th March, 1923, when it was finally dismissed, because the list of immoveables was only produced on 5th April, 1922, after the expiry of twelve years from 7th March, 1910.

*C R P No. 776 of 1923. 8th September, 1925.

Sankaran Nair v. Ambu.

I cannot hold that the order is illegal. The Court has an option under O. 21, R. 17, either to reject the application or to allow the defect to be remedied within a time to be fixed by it. Possibly the Munsif might, even on 15th March, 1923, have ordered the list of immoveable properties to be produced on 5th April, 1922, which would have dated the petition as from 28th February, 1922, and would thus have saved the bar of limitation. But he cannot be said to have refused jurisdiction by declining to pass this remedial order. He is equally acting within his discretion when he finds that no time was fixed for remedying the defect, and, therefore, the application must date from the time when it fully conformed to O. 21, R. 13 which would be April 5. The ruling reported in *Vemuri Pitchayya* v. *Rajah Yarlagadda Ankineedu* (1) turns on a converse case. There the District Munsif had exercised his discretion by fixing a time for the production of the descriptive schedule after the expiry of twelve years and this Court declined to interfere. But, of course, it was not held that the Munsif was bound to exercise his discretion in that manner. If he had liked to adopt the alternative he could have dismissed the application. Spencer, J. observes : "I am, with due respect, inclined to think that the words 'on receiving an application for the execution of a decree' in R. 17 were not intended to make a party suffer for the failure of the Court establishment, which checks plaints and execution petitions on their presentation, to at once notice all defects in any application that may be received and that these words do not preclude a Court from making an order allowing a defect to be remedied at a later stage." This can hardly be taken as putting the whole responsibility upon the Court. An applicant who files an application not in compliance with O. 21, R. 13, does so at his own risk, and he cannot demand, as of right, that it shall be regularized by the Court establishment. In the present case, too, there is no question of suffering for the failure of the establishment, because the petitioner knew all along that his application was defective, and remedied that defect on his own initiative.

This judgment has proceeded on the assumption warranted by *Vemuri Pitchayya* v. *Rajah Yarlagadda Ankineedu* (1), that a Court retains its discretion to order the defect to be remedied after the application has been admitted and register-

1. (1923) 45 M L J 651.

Sankaran Nair v. Ambu.

ed, but before it has been finally disposed of in one of the ways mentioned in O. 21, R. 17 (1).

As regards *Asgar Ali* v. *Troilokya Nath Ghose* (2) which the Lower Court cites, it may be observed that the point specifically referred to the Full Bench has now been settled by cl. (2) of O. 21, R. 17, which is an addition to the old S. 245. If an application is defective by not containing a description of the property, it is none the less an application, provided that the Court has permitted the defect to be remedied. It also happened to be ruled in the same case that such permission could only be given before admission and registration (pp. 635-636). Whether "on receiving" in O. 21, R. 17 (1) requires such strict interpretation is the question discussed in *Vemuri Pitchayya* v. *Rajah Yarlagadda Ankineedu* (1). Of course it would make the petitioner's case considerably weaker, if it were held, following *Asgar Ali* v. *Troilokya Nath Ghose* (2) that the Munsif had no jurisdiction in 1923 to order the defect to be remedied, but even allowing in the light of *Vemuri Pitchayya* v. *Rajah Yarlagadda Ankineedu* (1) that he had jurisdiction, I do not find that he exercised it improperly.

The petition is dismissed with costs.

T. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Ravipati Ramaiah ... *Appellant** (*Plaintiff*)

v.

Ravipati Lakshmi Narayana and another ... *Respondents* (*Defendants*).

Ramaiah v. Lakshmi Narayana.

Civil Procedure Code, S. 11, Explanation IV and O. 2, R. 1—Suit in ejectment—Prior suit for possession between same parties—Dismissal of—Form of claim different—Effect of—"Subjects in dispute"—Meaning of.

Properties belonging to *X* were in the possession of *Y*, a relation. After the death of *X* and *Y*, the plaintiff claiming to be the reversionary heir of *X*, sued in ejectment the defendants, who were in possession after the death of *Y*. That suit was dismissed, and thereupon a second suit was instituted by the plaintiff to recover the same properties from the same defendants on the ground that he was the heir of *Y*. *Held*, the suit was barred under S. 11, Explanation IV, Civil Procedure Code, as the plaintiff might and ought to have put forward both his titles in the prior suit.

The expression "subjects in dispute" in O. 2, R. 1, refers to the right which one party claims against the other and not to the cause of action alone.

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*S A No. 43 of 1923. 10th August, 1925.

1. (1923) 45 M L J 651.
2. (1890) I L R 17 C 631 (F B).

Ramaiah v. Lakshmi Narayana.

Second Appeal against the decree of the District Court of Guntur in A. S. No. 262 of 1921 preferred against the decree of the Court of the District Munsif of Narasaraopet in O. S. No. 1326 of 1919.

Ch. Raghava Rao for plaintiff.

V. Suryanarayana for respondents.

The Court delivered the following

JUDGMENT :—The plaintiff-appellant brought a suit to recover certain property alleging that he was the reversionary heir of one Venkanna. The property had been in the possession of Narasamma, a female relation of Venkanna, and, according to the plaintiff, her possession was under licence from him. He therefore sued to recover the property from the defendants who were in possession after Narasamma's death. The suit was dismissed. The present suit was brought to recover the same property from the same defendants on the ground that the plaintiff was the heir of Narasamma who had been in possession of the property. The Lower Courts have found that this suit is barred under S. 11, Explanation IV of the Civil Procedure Code and the Court of First Instance relies on the decision in *Govinda Menokki* v. *Govinda Kurup* (1) for its decision. That case appears to be very much in point, as also a very recent case reported in *Muhammad Rowther* v. *Abdul Rehman Rowther* (2). There are also cases [*Masilamani Pillai* v. *Thiruvengadam Pillai* (3) and *Rangasami Patrudu* v. *Appalasami* (4)] which all support the Lower Court's decision, and there is also a very recent pronouncement of the Privy Council reported in *Fateh Singh* v. *Jagannath Baksh Singh* (5) which is authority to the same effect.

The learned vakil for the appellant is constrained to rely mainly on cases which were decided under the Civil Procedure Code of 1859, viz., *Musammat Nousha Begam* v. *Musammat Umrao Begum* (6), and the dissenting judgment of Garth, C. J. in *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (7). Those judgments, however, whether they were under the then existing Code correct or not, appear to be in conflict with the very early case of the Privy Council in *Woomatara Debia* v. *Unnopoorna Dassee* (8). It seems to me here that the plaintiff at the time of bringing his first suit possessed, as he

1. (1919) 10 L W 170.
2. (1922) I L R 46 M 135.
3. (1908) I L R 31 M 385.
4. (1916) 1 M W N 286.
5. (1924) 48 M L J 64 : 52 I A 100 (P C).
6. (1875) 7 N W P H C R 60.
7. (1876) I L R 2 C 152 (F B).
8. (1872) 11 B L R 158 (P C)

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alleges, title as reversioner to Venkanna and also as heir to Narasamma. He sued on his title as absolute owner alleging that the defendants had trespassed upon the property. His cause of action was his absolute right to the property which had been infringed by the trespass of the defendants. Whether his title came to him in one way or in another it appears to me to be immaterial, for it would give him no different right as against the defendants or in respect of the alleged act of trespass, and I think that, under S. 11, Explanation IV, he certainly might have put forward both his titles to the property and I think that he also ought to have done so. In deciding whether he ought to have done so, the provisions of O. 2, R. 1 are relevant. That rule says :—

> "Every suit shall, as far as practicable, be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them."

Therefore, when the plaintiff brought his first suit, he should have framed it as far as practicable so as to afford ground for final decision in order to prevent further litigation. There is no inconsistency between the two pleas set up by him and it would not have been inconvenient to try them together. Since, therefore, R. 1 says that every suit shall be framed so as to afford ground for final decision, I think under Explanation IV the suit ought to be so framed if possible and the plaintiff ought to have framed his first suit so as to include both the titles which he has now set up in separate suits. Reliance is placed by the appellant on *Ramaswami Aiyar* v. *Vythianatha Aiyar* (9), but, so far as the facts of the case are concerned, they do not help him, for they relate to a case where two different mortgages were sued on, but certain observations are relied on which I do not think really help the appellant. It is suggested that the words "subjects in dispute" in O. 2, R. 1 really mean cause of action and cause of action alone, but the observation in *Ramaswami Aiyar* v. *Vythianatha Aiyar* (9) is as follows :—

> "The expression 'subjects in dispute' means the cause of action or the subject-matter of litigation, that is, the right which one party claims as against the other."

Here the only right claimed by the plaintiff as against the defendants is the right to possession as owner, and, consequently, the 'subject in dispute' is the same in both the suits.

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9. (1903) I L R 26 M 760 at 766 : 13 M L J 448.

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Again a quotation from Scotland, C. J.'s judgment in *Chinniya Mudali* v. *Venkatachala Pillai* (10) appears at page 322 :—

"I take it to be also clear, as a general rule, both on principle and authority, that when a question of right or title has been adjudicated on in a suit, the bar of judgment cannot be avoided by suing on a new form of claim or on a ground of relief which might have been, but was not raised or determined in the former suit."

That appears to be applicable to the facts of the present case. The plaintiff brought his first suit on title. He brought the second suit on the same title, merely alleging different facts as the basis of that title ; in fact, this second suit is simply a new *form* of his claim as against the defendants. I do not think it is necessary to refer at length to the cases in this Court cited by appellant—*Allunni* v. *Kunjusha* (11) and *Mangalathammal* v. *Veerappa Goundan* (12)—which can be distinguished on their facts. Following *Muhammad Rowther* v. *Abdul Rehman Rowther* (2) I must hold that the Lower Appellate Court was right and dismiss the Second Appeal with costs.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

R. V. Srinivasa Aiyangar and another ... *Appellants** (*Petitioners*)

v.

Ry. Pratapa Simha Rajah Saheb,
the Junior Prince of Tanjore,
Tanjore Palace ... *Respondent* (*2nd Deft*).

Srinivasa Aiyangar v. Pratapa Simha Rajah Saheb.

Civil Procedure Code, O. 22, R. 10—Applicability—No pending suit—Mortgagee claiming to be impleaded in proceedings relating to division of sum in Court deposit—Failure of consideration set up—Remedy by suit.

O. 22, R. 10, Civil Procedure Code, applies only to pending suits whereby a person who derives title from a party will be entitled to be brought on record if it is shown that he has secured a good title from the party and it is to his interest to be brought on record in the suit. Where the suit has come to a termination and in pursuance of the decree passed therein a sum of money in Court deposit to the credit of the suit is being divided, a mortgagee from one of the parties cannot claim to be impleaded under O. 22, R. 10, especially when the transaction is alleged to be usurious and the mortgagor denies the passing of

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*A A O No. 169 of 1925. 15th September, 1925.

10. (1867) 3 M H C R 320. 11. (1883) I L R 7 M 264.

12. (1919) M W N 287 2. (1922) I L R 46 M 135

consideration in full. The remedy of the mortgagee in such a case is to enforce his mortgage right in the ordinary course.

Srinivasa Aiyangar v. Pratapa Simha Rajah Saheb.

Appeal against the order of the District Court of West Tanjore at Tanjore, dated 21st November, 1924, in I. A. No. 335 of 1924 in O. S. No. 3 of 1919.

A. Krishnaswami Aiyar for appellants.

T. V. Muthukrishna Aiyar and *S. V. Narayana Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—This appeal is against the order of the District Judge of West Tanjore declining to make the appellants parties to O. S. No. 3 of 1919 on the file of the Court. The appellants applied to the Lower Court to be made parties to the suit on the ground that they were mortgagees of the interest of Pratapa Simha Rajah, the 2nd defendant in O. S. No. 3 of 1919. The contention of the appellants is that they have got a mortgage of the interest of the 2nd defendant in the suit and that they are therefore entitled to be made parties to the suit. The learned Judge has considered the petition on the merits and has declined to make them parties. The petitioners have taken a mortgage of the share of the 2nd defendant for Rs. 1,70,000. The suit was decreed some time ago and the appeal against the decree of the Subordinate Judge was disposed of by this Court in 1923. Pursuant to the decree of the High Court, the properties in suit are being divided, and a sum of about Rs. 70,000 is said to be in deposit in the District Court to the credit of the suit. The objection of the 2nd defendant to the petitioners being brought on record is that the transaction evidenced by the mortgage is an usurious transaction and that out of Rs. 1,70,000 not even Rs. 50,000 was spent on behalf of him. The answer of the appellants is that at least Rs. 50,000 is admitted to have been received by the 2nd defendant, and, therefore, so far as that amount is concerned, the appellants are entitled to be paid by the 2nd defendant. It is unnecessary to consider this question in a matter like this. The suit was disposed of some time ago and the application is made under O. 22, R. 10 of the Code of Civil Procedure. That rule applies only to pending suits, whereby a person who derives title from a party will be entitled to be brought on record if it is shown that he has secured a good title from the party, and that it is to his interest to be brought on record in the suit. In this case the suit has come to a termination and a decree has been passed. The object of the appellants is to secure the

Srinivasa Aiyangar v. Pratapa Simha Rajah Saheb.

amount in Court in part discharge of the mortgage amount. The contention of Mr. Alladi Krishnaswami Aiyar is that he being a mortgagee of immoveable property is entitled to be paid the amount in Court. No doubt in cases of ordinary mortgage of a fund or sum of money the mortgagee would be entitled to be paid out of the amount, but where the claim is resisted on the ground that the transaction is an usurious transaction and the consideration recited in the mortgage document did not actually pass, we do not think the Court will be justified in making a person a party to the suit and thereby prevent the person from whom he derived title from disputing his right to receive the amount. By making the appellants parties to the suit very serious complication will arise. They can have their remedy by bringing a suit against the 2nd defendant. It would not be right at this stage to make the appellants parties to the suit and thereby prevent the 2nd defendant from putting forward any defence he may have to the claim of the appellants. In this connection we may refer to a recent judgment of the Privy Council reported in *Lajwanti* v. *Safa Chand* (1) where their Lordships observe:—

"It is out of the question that persons, who assert that they have a derivative interest in the stake of a suit, can by getting added as plaintiffs, be associated in a decree, in favour of the person who has the only real title."

In this case there has been no devolution of interest in the sense that all the interest of the 2nd defendant has come to the appellants. The appellants have only a mortgage interest and they have to enforce the mortgage right in the ordinary course. We think the order of the learned Judge is correct and we dismiss the appeal with costs.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

R. M. N. Muthuraman Chettiar and another ... *Petitioners** (*Petitioners*)

v.

Uppaluru Seetharamayya and others ... *Respondents* (*Respondents*).

Muthuraman Chettiar v. Seetharamayya.

Civil Procedure Code, O. 21, R. 58 (1) proviso—Claim petition—Registered mortgage—Sale directed to take place with notice of mortgage—Nature of order—Duty of Court to investigate.

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*C R P No. 207 of 1925. 20th August, 1925.

1. (1925) 22 L W 304 (P C).

Muthuraman Chettiar v. Seetharamayya.

A mortgagee put in a claim petition under O. 21, R. 58, to have his mortgage right notified in the sale proclamation and to have the property sold subject to such right and further to stop the sale pending disposal of the claim petition. The Court passed the following order :—"The mortgage is registered and in the ordinary course should have found a place in the encumbrance certificate. The decree-holder opposes the petition as it is filed too late. Sale to take place with notice of this mortgage and that decree-holder disputes it." *Held*, the order was not one refusing to investigate into the claim, and being simply a refusal to stop the sale, did not relieve the Court of the necessity of either investigating the claim or of refusing an investigation under the proviso to O. 21, R. 58 (1). *Venkataratnam* v. *Ranganayakamma*, (1918) 35 M L J 335 (F B) and *Abdul Kadir* v. *Somasundaram Chettiar*, (1922) 43 M L J 467 referred to.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Bezwada, dated 17th March, 1925, in C. M. P. No. 492 of 1925 in O. S. No. 38 of 1922.

N. Sivaramakrishna Aiyar and *M. Venkatasubbiah* for petitioners.

G. Lakshmanna for respondents.

The Court delivered the following

JUDGMENT :—The petitioners seek to revise an order passed by the Subordinate Judge of Bezwada on a claim petition preferred by them under O. 21, R. 58, Civil Procedure Code. This petition contains two specific prayers :

"(a) To declare the mortgage right of the petitioners over the properties set out in the schedule annexed hereto and to have them sold subject to the mortgage amount ; and (b) to stop the sale pending disposal of this petition."

The learned Subordinate Judge passed the following order :—

"Counterfiled. The mortgage is registered, and in the ordinary course should have found a place in the encumbrance certificate. Decree-holder, however, opposes this petition as it is filed too late. Sale to take place with notice of this mortgage and that decree-holder disputes it."

The petitioners complain that the Court below failed to exercise its jurisdiction and state that it should either have investigated their claim or it should have refused to make such investigation after finding that their claim was designedly or unnecessarily delayed. Of course the present order is no investigation of the claim and there is no finding that the claim was filed with designed or unnecessary delay. The claim is so far admitted that the sale is ordered to take place with notice of this mortgage which to some extent might be taken as allowing prayer (*a*) and the sale is not stopped which is a denial of prayer (*b*). I should take the order as being simply a

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refusal to stop the sale and it does not relieve the Court of the necessity of either investigating the claim or of refusing an investigation under the proviso. It may be described as an interim order and no final decision. However, the counter-petitioners strenuously contend that this order must be construed as an order under the proviso in the light of the Full Bench ruling in *Venkataratnam* v. *Ranganayakamma* (1). The principal question agitated in that case was whether a refusal to investigate under the proviso of O. 21, R. 58, could be taken as an order against the party within the mischief of O. 21, R. 63, Civil Procedure Code, and Art. 11 of the Limitation Act. But incidentally the Court held that the order in the case amounted to an order under the proviso to R. 58, and the counter-petitioners contend that that order is on all fours with the one in question in the present case. As a matter of fact the order as printed in *Venkataratnam* v. *Ranganayakamma* (1) is rather deceptive because it gives the impression that the whole order has been transcribed whereas only one sentence has been extracted. This was first noticed by Sir Walter Salis Schwabe, C. J., in *Abdul Kadir* v. *Somasundaram Chettiar* (2) and he recalled the original order to which I also have referred. It runs from the second paragraph :—

"As this (the zamindarini's) petition was filed late this claim was ordered to be notified to the intending bidders. The zamindarini has not obtained a decree against judgment-debtor for the cist, nor has she apparently filed a suit within (*sic*) in this Court or before the Revenue Court, nor has any suit been filed about the land not being saleable. The fact (*sic*) fresh petition has been filed for an inquiry being made as to the claim of the land not being saleable nor was an enquiry sought on the strength of that petition, though nearly ten months have elapsed since then. Decree-holder's prayer that the sale should be held subject to this claim for cist which has not yet been proved inadmissible. The allegations of the zamindarini will be notified to the bidders with the remark that the zamindarini did not take steps for her claim being enquired into during the last ten months."

As Sir Walter Salis Schwabe, C. J. observes, the Full Bench treated that order as a refusal of the application on the ground that there had been laches or delay which brought the matter under the proviso to O. 21, R. 58. The order in the present case is very different. The Subordinate Judge begins by finding that the mortgage is registered and one which in the ordinary course should have found a place in the encumbrance certificate. He evidently thinks that the encumbrance certificate is in error, for, he proceeds to order that the sale shall take

1. (1918) I L R 41 M 985 : 35 M L J 335 (F B).
2. (1922) I L R 45 M 827 : 43 M L J 467.

place with notice of this mortgage. He does not find as is now suggested on behalf of the counter-petitioners that the mortgage was in respect of property not affected by the sale. He mentions that the decree-holder opposes the petition as it is filed too late, but he gives no opinion himself as to whether there has been any delay. I cannot hold that such an order is one where in the words of Napier, J., in the reference to the Full Bench in *Venkataratnam* v. *Ranganayakamma* (1), a Court purports to make an order under the proviso to O. 21, R. 58, that is to say, an order refusing to investigate. The learned Subordinate Judge has not refused to investigate and has not suggested any reasons why he should refuse to investigate. I find that so far all that he has done has been to refuse to stop the sale, and to give to the bidders notice of this mortgage and of the decree-holder's objection, and I direct that he shall proceed to dispose of the petition according to law. Until he does so it cannot be treated as decided. Accordingly the petition is allowed with costs. Pending the decision of this petition the sale which was stayed by an interim order of this Court is stayed. I observe that this Court has already deprecated the practice of selling property with notice of the unascertained claims. [Vide *Venkataratnam* v. *Ranganayakamma* (1) and *Sharafi* v. *Ali* (3).].

T. S. V. *Petition allowed and case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

V. Gopal Naidu ... *Appellant** (*Debtor*)

v.

Mohanlal Kanyalal and two others ... *Respondents.*

Gopal Naidu v. Mohanlal Kanyalal.

The Presidency Towns Insolvency Act (III of 1909), S. 9 (d) (iii) and Explanation—Partnership—Managing partner and absentee partner—Acts of bankruptcy—Flight of managing partner—Who can be adjudicated on.

Two partners were carrying on business in Madras. One of them was residing there and managing the business, while the other was living in the mofussil, though occasionally coming to Madras to look into the accounts and see how the business was progressing. The business got into difficulties and the managing partner closed the business and went away to avoid the creditors. The question was whether this act could be made the foundation of insolvency proceedings against the other partner. *Held*, the principle of Insolvency Law was that in order to adjudicate a man insolvent, the act of insolvency relied on

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*O S Appeal No. 70 of 1924. 24th August, 1925.

1. (1918) I L R 41 M. 985 : 35 M L J 555 (F B). 3. (1922) 44 M L J 741.

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must be some act which can be definitely brought home to him. An act of an agent, authorised by the principal and of which he has cognizance, can also bind the principal; but it cannot be laid down that in all circumstances the act of an agent closing down the principal's place of business should be treated to be the act of the principal. The decision must depend on the particular facts of each case. On the facts of this case, the closing of the business by the managing partner was not necessarily in law the act of the other partner and he could not therefore be adjudicated on the basis of that alone.

English and Indian case-law discussed.

On appeal from the judgment and order of the Hon'ble Mr. Justice Ramesam, dated 23rd September, 1924, and passed in the exercise of the Ordinary Original Insolvency Jurisdiction of the High Court in I. P. No. 7 of 1923.

V. Varadaraja Mudaliar for appellant.

O. Thangkachellam Chettiar and *K. S. Krishnaswami Aiyangar* instructed by *Messrs Short, Bewes and Company* for respondents.

The judgment of the Court was delivered by

Coutts Trotter, C. J.

The Chief Justice :—This case raises a point of some interest. Two persons traded together in partnership. A man called Anantha Mudali, about whom no question arises in these proceedings, and the appellant, Gopal Naidu, had carried on a produce business in Madras and the facts seem to be that Anantha Mudali was managing the business in Madras, whereas Gopal Naidu resided ordinarily at Wallajabad, but the evidence which is given in the case—and that is the evidence that was relied upon by the adjudicating creditors themselves—establishes two things. The first is that when anybody, after the difficulties arose—and in this concern they did arise—wanted to see Gopal Naidu when he went to Wallajabad, he found Gopal Naidu without difficulty and was able to put whatever he wanted to put before him. The other fact that emerges is that, although Gopal Naidu ordinarily resided at Wallajabad, he did from time to time come to Madras and look into the accounts and see how the business was progressing. What is before us is an appeal by Gopal Naidu against his adjudication. The circumstances which led to it are these. The business got into difficulties when the debts due to the petitioning creditors amounted to something over Rs. 10,000 and the difficulties came to ahead,—we will take it as proved, for it is not disputed—when Anantha Mudali closed the business and went away in order to get out of the clutches of his creditors, thereby committing an act of insolvency, so far as he is concerned under S. 9 (*d*) (*iii*) of the Presidency Towns

Gopal Naidu v. Mohanlal Kanyalal.

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Insolvency Act. That is a perfectly good foundation for the insolvency petition and the adjudication consequent upon it as against Anantha Mudali, but it has been sought in this case to use that act of Anantha Mudali in order to lay the foundation not merely of the petition against Anantha Mudali himself but of the petition against the appellant Gopal Naidu.

We had a very interesting argument practically giving us the whole of the history of the law on this matter both in England and in India. There is no doubt that the English cases of which I may take as an instance, *Mills* v. *Bennett* (1), is one of the earlier and *Ex parte Blain, In re Sawers* (2) and *Cooke* v. *Charles A. Vogeler Company* (3) are some of the later, clearly lay down the principle that, in order that a man may be made a bankrupt, the act of bankruptcy relied upon in English Law must be some act which can be definitely brought home to him, and the learned Judges point out that the act of an agent cannot ordinarily found a petition in bankruptcy. The chief pronouncement which has been approved of in many subsequent cases is contained in the judgment of Brett, L. J. in *Ex parte Blain* (2). He says :—

"It was said that a person may commit an act of bankruptcy by his agent, and that the partner in *England* was the agent of these foreign partners, and therefore they committed an act of bankruptcy by their agent in *England*, that is, by allowing the execution to go without satisfying the judgment, and that, this having been done by their agent in *England*, they ought to be adjudged bankrupts. That assumes that a man can commit an act of bankruptcy by his agent, whether he has authorised the particular act or not, and that assumption seems to me to be equally wrong. I think that a man cannot commit an act of bankruptcy by a particular act of his agent which he has not authorised, and of which act he has had no cognizance."

That is what Brett, L. J. said in *Ex parte Blain* (2), and, in my opinion that is good law to-day in England and with a certain modification is probably good law in India. Meanwhile, the matter had arisen on several occasions in Calcutta as to whether a man could be adjudicated a bankrupt, because of the act of some person whom he left in charge of his business, namely, a *munib gumastha* or a *quasi* partner with the authority of an agent to act for his fellow-partners ; and, so far as the High Court of Calcutta is concerned, the matter came to ahead in the case of *In re Dhunput Singh* (4) which was decided in the year 1893 by a Bench consisting of Sir Comer Petheram, *Chief Justice*, Mr. Justice Prinsep and Mr. Justice Pigot. In that case there was a pronouncement

1. 2 M & S Reports 556.
2. L R (1879) 12 Ch. D 522 at 529.
3. (1901) A C 102.
4. (1893) I L R 20 C 771.

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of Mr. Justice Trevelyan, which lends colour to the suggestion that the act of an agent in departing with intent to defeat creditors was always, as a matter of course, to be treated as a departure by the principal on the ordinary principles of agency, and that view was definitely rejected by the Court very largely on the authority of the English cases. The learned Judge who deals most clearly with the matter is Mr. Justice Pigot. At page 795 of the Calcutta Reports, he says :—

"I think the general proposition laid down by Lord Justice Brett in *Ex parte Blain, In re Sawers* (2) only affirms, and is intended to affirm, the rule stated before by Lord Tenterden. 'I think a man cannot commit an act of bankruptcy by a particular act of his agent which he has not authorised, and of which act he had no cognizance.'

This general rule is, I apprehend, applicable in cases outside those of the class with which we are here concerned and it seems to me absolutely to govern this case. There are, therefore, two reasons why the acts of Panna Lal in this case, assuming them to amount, so far as he personally was concerned to a departure, etc., with intent, etc., cannot be acts of insolvency committed by his master, Dhunput Singh. The first is that the nature of the acts themselves, as described in the section, is incompatible with the possibility of their being committed by any one but the debtor himself, the departure must be his departure and the intent proved must be his intent. The second is that a man cannot commit any act of bankruptcy by an act of his agent which he has not authorised, and of which act he had no cognizance."

He then goes on to say that, in accordance with the principles stated above, which he accepts as correct, he thinks he must pronounce that the earlier case in the Calcutta High Court of *In re Hurruck Chund Golicha* (5) decided by Broughton, J. sitting in insolvency was wrongly decided. This very case of Dhunput Singh came up before the Privy Council and was dealt with in *Kastur Chand Rai Bahadur* v. *Dhanpat Singh Bahadur* (6) in a judgment which was delivered by Lord Hobhouse. Their Lordships adopted what I may call a middle course. They thought that Mr. Justice Pigot had put the supposed rule much too broadly and they thought that it was impossible to say that there can be no case in which the act of an agent in closing down the business, and absconding from the creditors could be treated as an act of the principal and they proceeded to say that there might be cases, of which by the way the one before them they clearly considered not to be one, in which a Court would be justified in certain circumstances in holding that the act of the agent in violation of the section of the bankruptcy might and should be treated as the act of the principal and

2. L R (1879) 12 Ch D 522 at 539. 5. (1880) I L R 5 C 605.
6. (1895) I L R 23 C 26 : 5 M L J 269 (P C).

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in the light of that the expression of opinion by Mr. Justice Pigot required modification and a much more flexible rule should be laid down. I am reading from page 35 in which, after setting out the view taken by Mr. Justice Pigot and the High Court, their Lordships go on to observe as follows :—

"So understood, their Lordships cannot assent to the principle laid down by the High Court [in *Dhunput Singh's case* (4)]. The position of a *gumastha* differs in different cases. In some cases he may be little more, or no more, than an ordinary manager. In others he may represent the business so entirely that the beneficial owners have no practical control over it and are quite unknown to the customers. Mr. Justice Pigot states the possible position of a *gumastha* with even more force than does Mr. Justice Broughton [I think in *Hurruck Chund's case* (5)]. He says: 'It often happens that a large business is carried on for years by a *munib gumastha* or by a succession of them, in the name of principals, who never are seen, or personally known, in connection with the business at all; sometimes in the name of family firms the members of which are constantly fluctuating from generation to generation, and of which firms it is or may be difficult to determine who are, at any given time, actually members."

Then their Lordships go on as follows :—

"Their Lordships think otherwise. They cannot hold that the creditors of firms exclusively managed by *gumasthas* have no remedy by way of insolvency, whatever the *gumasthas* may do; though he may make fraudulent conveyances, promote fraudulent executions, or as in *Hurruck's case* (5) 'leaving the creditors to find him or his master if they could.' And yet that consequence must follow if the principle laid down by the High Court in this case be the true one."

And then they go on to say :—

"It is a question in each case whether the *gumastha* occupies such a position that the owner must stand or fall by his acts, so that his fraud or his flight shall by imputation be the fraud or flight of the owner or multitude of owners, for the purpose of bringing their case within the Statute of Insolvency. Their Lordships agree with the Judges who have held that the Statute admits of application to such cases, and that to exclude it may lead to injustice and confusion in many cases. They are by no means prepared to say that *Hurruck's case* (5) was wrongly decided; though the position of the *gumastha* there is not stated so fully as they would think desirable if the case were before them for decision. On the other hand they have no hesitation in agreeing with the High Court that Punna did not occupy such a position as to make the respondent liable to be declared insolvent on the ground of his personal conduct. The respondent appears to have been an active and responsible owner. His residence and head *koti* at Azimgunge were well known. He occasionally came to Calcutta and to the *koti*. When difficulties arose, Punna applied to him to meet them; and when payment was suspended, Punna openly, by himself or by his servants, told the creditors that his principal was coming, and that they must wait for his action. Under such circumstances, even if Punna himself had committed the acts alleged by the appellant, it would, in their Lordships' opinion, be wrong to hold that his acts were those of the respondent."

4. (1893) I L R 20 C 771. 5. (1880) I L R 5 C 605.

Gopal Naidu v. Mohanlal Kanyalal.

Coutts Trotter, C. J.

In that case a hint had been thrown out by Mr. Justice Pigot in the High Court and then by way of encouragement of the suggestion by Lord Hobhouse in the Judicial Committee that the case was one which might aptly be met by further legislation, and I suppose that it was that suggestion which brought about finally the Presidency Towns Insolvency Act of 1909 long after. We have the desired legislative machinery in the explanation to S. 9. That explanation runs as follows :—

"For the purpose of this section, the act of an agent may be the act of the principal, even though the agent may have no specific authority to commit the act."

I take that section to be an attempt by the draftsman to carry out broadly and in spirit the effect of the observations of their Lordships of the Judicial Committee in *Dhunput Singh's case* (4) and I am content to deal with it on that footing.

Unfortunately in this country a misinterpretation, as we feel constrained to regard it, has been put upon that section, and, for this purpose, I wish to refer to two cases. One is the case reported in *In the matter of Brijmohun Dobay* (7), a decision of Mr. Justice Sale sitting alone in insolvency. What Mr. Justice Sale says on this point is very brief and I will read his exact words. He deals first with a different point with which we are not concerned and then he goes on to say this :—

"If I had taken another view of this point, the question would still remain as to whether the departure of the *gumastha* under the circumstances and under the instructions of the debtor did not constitute an act of insolvency."

Why indeed should it not ? For, as is clearly expressed in the learned Judge's words, the departure of the *gumastha* was under the express instructions of the master. We are here concerned with a case where the departure of the agent is *ex hypothesi* an act done by himself without express authority of the principal. Then he goes on to say :—

"The difficulties which arose in *Dhunput Singh's case* (4) are absent from this. (We do not know what those difficulties are but one of them was clearly the absence of express instructions of the principal) and I am inclined to think that the departure of the *gumastha* did, under the circumstances, amount to an act of insolvency on the part of the debtor."

This is really a decision on the facts of that case, and we entirely agree with the learned Judge that the facts of that

4. (1893) I L R 20 C 771. 7. (1897) 2 C W N 506.

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Coutts Trotter, C. J.

particular case were such that certainly under the section of the Presidency Towns Insolvency Act and also previously to it under the guidance of the judgment of the Privy Council in *Kastur Chand Rai Bahadur* v. *Dhanpat Singh Bahadur* (6) his was a perfectly correct determination of the matter before him.

The judgment of Sale, J. came before a Division Bench of this Court consisting of Spencer and Phillips, JJ. There is no doubt, looking at the report the one I have before me is *Kalianji Singji Bhai* v. *Bank of Madras* (8) that those learned Judges regarded this decision of Mr. Justice Sale as laying down the sweeping principle that in all circumstances the act of an agent in closing down the principal's place of business must be treated to be the act of the principal and they treated that as being the existing law. They refer to English cases and they go on in these words :—

"In India it has been expressly enacted as an explanation to S. 4 of the Provincial Insolvency Act (that is the same in words as S. 9 of the Presidency Towns Insolvency Act) that for the purpose of that section, which deals with acts of insolvency committed by a debtor, the act of an agent might be the act of the principal. It was accordingly held in *In the matter of Brijmohun Dobey* (7) that the departure of an agent from the place of business did constitute an act of insolvency on the part of the principal."

It did on the particular facts of that case, but unfortunately the learned Judges of the Madras High Court have taken to be a hard and fast rule of law what in truth and in fact was a decision on the particular facts of that particular case and the same fallacy undoubtedly vitiates the reasoning of Mr. Justice Ramesam when he tried this case. He took the decision of the C. W. N. case and he took the decision of the Madras High Court as laying down a hard and fast rule which he was bound to respect, and without reference to the particular circumstances of the case, he thought he was in law bound to treat the act of the agent as inevitably the act of the principal, which is clearly incorrect.

In the light of these principles Mr. Thanikachalam Chetty very wisely does not seek to uphold the decision of the learned Judge on this point. When we look at the affidavits it is clear that the facts of the case which are put by the creditors themselves before the Court constitute just the kind of facts which would enable the Court in its discretion to say in a particular case, "this is not the sort of case where we will do what the

6. (1895) I L R 23 C 26 : 5 M L J 269 (P C).
7. (1897) 2 C W N 306.
8. (1915) 29 M L J 788.

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Act allows us to do, namely, treat the unauthorised act of the agent in closing down the business as in law being the act of the principal." Mr. Thanikachalam Chetty does not, therefore, press us to remit the case back. On a further consideration in the light of these principles, he is content that the adjudication of Gopal Naidu should be quashed on the ground that circumstances exist here which do not permit of the Court saying that the act of Anantha Mudali in closing down the business could be treated on the material before the Court as being necessarily in law the act also of Gopal Naidu. That is the sole ground on which we decide this case.

It was argued before the learned Judge on behalf of Gopal Naidu that he was in no circumstances accountable for the debts of the business which were relied upon by the petitioning creditors because it was said that he had before these debts were incurred executed a dissolution of partnership and ceased to be a partner. That question has not been gone into before us. The learned Judge found against Gopal Naidu on that and Mr. Krishnaswami Aiyangar has not, in view of the other point on which he felt he was likely to succeed, touched that question. If, therefore, the matter ever comes before the Court in any other form, the whole subject is open and it is competent to Mr. Krishnaswami Aiyangar to contend that the learned Judge was wrong in forming the conclusion that the supposed deed of partnership was a sham. It is open to Mr. Thanikachalam Chetty, on a proper view of the documents and the circumstances which were not put forward before, to say that the learned Judge is right and it was a sham. In the view we have taken it is not necessary for us to deal with that point at all and we are content to decide on the ground that has been argued before us.

The result will be that the appeal is allowed. Costs of the appeal of both sides on the O. S. scale will come out of the estate.

T. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Puthia Madathil Subramaniam Pattar
of Engadiyur Amsom and Desam
(dead) and another ... *Appellants** (*Plaintiff and his L. R.*)

v.

Engadiyur Devaswom Uralan Antoli
Nani Amma's son Karnavan Velu Nair
and others ... *Respondents* (*Defendants*).

Subramaniam Pattar *v.* Velu Nair.

Promissory note—Liability under—Malabar devaswom—Uralars of—Promissory note by, for amount properly raised on behalf of devaswom—Suit on note—Decree against devaswom—Plaintiff's right to.

A promissory note executed by the two defendants, the Uralars of a Malabar devaswom, recited that the two defendants promised "in our capacity as Uralars of the devaswom to pay" and that "the amount that has been taken in cash is due to you from the devaswom."

In a suit on the promissory note, *held,* that the plaintiff was entitled not only to a personal decree against the Uralars, but to a decree against the devaswom in case there was necessity to borrow on behalf of the devaswom.

Second Appeal against the decree of the District Court of South Malabar in A. S. No. 465 of 1921 preferred against the decree of the Court of the District Munsif of Ponnani in O. S. No. 673 of 1919 (O. S. No. 906 of 1918 on the file of the Court of the District Munsif of Chowghat).

K. P. Ramakrishna Aiyar for appellants.

K. P. M. Menon for respondents.

The Court delivered the following

JUDGMENT :—This is a suit on a promissory note executed by the defendants who are Uralars of a devaswom. In the promissory note it is recited that the two defendants promise "in our capacity as Uralars of the devaswom to pay" and again we have the recital "the amount that has been taken in cash is due to you from the devaswom." Notwithstanding this specific recital of the liability of the devaswom for the suit debt the Lower Appellate Court has held, relying on *Saminatha Aiyar* v. *Srinivasa Aiyar* (1), that the plaintiff is entitled only to a personal decree against the Uralars. Since the District Judge delivered his judgment another case of this Court has been reported, namely, *Sundaresan Chettiar* v. *Viswanatha Pandara Sannadhi* (2), in which the facts are identical with

*S A No. 1720 of 1922. 23rd July, 1925.

1. (1916) 32 M L J 259.
2. (1922) I L R 45 M 703 : 43 M L J 147.

Subramaniam Pattar v. Velu Nair.

the present case, namely, there was a distinct understanding in the promise made by the Uralars that the money was to be repaid out of devaswom funds, that is to say, not only did they pledge their personal credit but they entered into a contract with the plaintiff that the devaswom funds should be liable for the repayment of the debt. These facts distinguish the present case from that reported in *Saminatha Aiyar* v. *Srinivasa Aiyar* (1) and also that in *Ammalu Ammal* v. *Namagiri Ammal* (3). In this latter case the learned Judges refused to consider the question of liability of trustees of religious institutions and based their judgment on the liability of secular trustees and adopting the same argument as that adopted in the earlier case held that there was only a personal liability. This conclusion is based on the principles of English Law relating to trustees but it is doubtful whether they are applicable in their entirety to persons like heads of mutts or managers of religious institutions who are not in the strict sense of the word trustees.

It is suggested for the respondents that because the earliest decision in *Srimath Deivasikhamani Pandara Sannadhi* v. *Noor Mahomed Rowther* (4) is doubted in *Saminatha Aiyar* v. *Srinivasa Aiyar* (1), whereas it is to a limited extent approved in *Sundaresan Chettiar* v. *Viswanatha Pandara Sannadhi* (2) that there is a divergence of opinion between the two Benches. But Krishnan, J. in *Sundaresan Chettiar* v. *Viswanatha Pandara Sannadhi* (2) merely says that he is inclined to follow *Srimath Deivasikhamani Pandara Sannadhi* v. *Noor Mahomed Rowther* (4) " where the debt is not incurred purely on the personal liability of the debtors ". This limitation of liability is the cardinal distinction between the present case and that in *Saminatha Aiyar* v. *Srinivasa Aiyar* (1) where the authority of the prior decision was questioned. I am bound by the decision in *Sundaresan Chettiar* v. *Viswanatha Pandara Sannadhi* (2) which is exactly in point and I may add thar I see no reason to doubt its correctness.

I may here observe that in dealing with the facts of this case I have taken one fact as assumed by both the Lower Courts, namely, that there was necessity to borrow on behalf of the devaswom. That point has not been decided by either Court. It will therefore be necessary to remit the case to the

1. (1916) 32 M L J 259.
2. (1922) I L R 45 M 703 : 43 M L J 147.
3. (1917) 33 M L J 651.
4. (1907) I L R 31 M 47 : 17 M L J 353.

District Munsif for decision of this issue and for final disposal in the light of the above remarks. The stamp on the appeal memo. will be refunded and the costs of this appeal will abide the result. Subramaniam Pattar v. Velu Nair.

A. S. V. *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Shiva Aithala ... *Appellant** (*Defendant*)

v.

Rangappaya Aithala ... *Respondent* (*Plaintiff*).

Hindu Law—Widow—Funeral expenses of—Liability for—Widow divided member—No self-acquisition of husband in her possession—Maintenance of widow contributed in equal proportion by her husband's nephew and great-nephew—Effect. Shiva Aithala v. Rangappaya Aithala.

A widow died being a member of a divided Hindu family, and not being in enjoyment of any self-acquired property of her husband. She was, during her lifetime, maintained by her husband's nephew and great-nephew each of whom contributed half. The question for decision was who was to defray her funeral expenses.

Held, that the nephew and the great-nephew of her husband must pay equally for her funeral.

There is no force in the contention that the relation who performs the ceremony under Hindu Law must necessarily pay for it.

Second Appeal against the decree of the Court of the Subordinate Judge of South Kanara in A. S. Nos. 34 and 35 of 1922 preferred against the decree of the Court of the Principal District Munsif of Mangalore in O. S. No. 96 of 1920.

B. Sitarama Rao for appellant.

K. Y. Adiga for respondent.

The Court delivered the following

JUDGMENT :—The short point in this second appeal is, who is to defray the funeral expenses when a widow dies being a member of a divided Hindu family, and not being in enjoyment of any self-acquired property by her husband, the widow being maintained by her husband's nephew and great-nephew each of whom contributed half. The Lower Courts have ruled that they should pay for her funeral in like proportion and this seems logical and equitable. If the family were not divided they would pay at this rate. There is no direct authority on the point, but Sir E. J. Trevelyan has deduced a similar

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* S. A. No. 488 of 1923. 31st July, 1925.

Shiva Aithala v. Rangappaya Aithala.

rule from such authority as exists. *See* Hindu Law, 2nd Edition, page 88. I see no force in the contention that the relation who performs the ceremony under Hindu Law must necessarily pay for it. In a joint family the son does not pay for the funeral of his father. Accordingly I confirm the decree of the Lower Appellate Court and dismiss this appeal with costs.

The respondent files a Memorandum of Objections and wishes an issue to be tried which was not previously framed and finds no place in the pleadings, whether under the partition of 1875 defendant was bound to pay the amount claimed irrespective of the receipts upon which until now his claim has been based. I consider that this new point cannot be raised at this late stage. The Memorandum of Objections is dismissed with costs.

A. S. V. *Both Appeal and Memo. of Objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

P. Narasimha Mudali and another... *Appellants** (*Plaintiffs*)

v.

Potti Narayanaswami Chetty and another ... *Respondents* (*Defendants*).

Narasimha Mudali v. Narayanaswami Chetty.

Contract—Repudiation by one party—Promisee's remedies in case of—Promisee if can sue upon breach and also keep contract open—Abandonment of contract—Implication of—Repudiation of contract coupled with delay in suing for its performance—Implication from.

If one party to a contract repudiate it, the promisee may treat the repudiation as inoperative, and at the end of the period of the contract, treat the other party as responsible for all the consequences of non-performance, thereby keeping the contract alive ; or, on the other hand, he may treat the repudiation as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it. The promisee cannot, however, both sue upon the breach and also keep the contract open.

A party to a contract cannot repudiate it, wait a year, and then suddenly insist upon its performance. The question turns upon whether his conduct gives rise to an implication of abandonment. Delay coupled with repudiation does give rise to such an implication.

Second Appeal against the decree of the Court of the Subordinate Judge of Chittoor in A. S. No. 282 of 1921 (A. S. No. 138 of 1921 on the file of the District Court of Chittoor)

*S A No. 18 of 1923. 31st July, 1925.

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preferred against the decree of the Court of the District Munsif of Sholinghur in O. S. No. 55 of 1920.

C. V. Anantakrishna Aiyar for appellants.

S. Jagadisa Aiyar for respondents.

The Court delivered the following

JUDGMENT :—This is a second appeal from the decree in A. S. No. 282 of 1921 on the file of the Subordinate Judge of Chittoor preferred against the decree in O. S. No. 55 of 1920 on the file of the Court of the District Munsif of Sholinghur. Both the Lower Courts have dismissed their suit and plaintiffs appeal.

A Chetty firm contracted with a Mudali firm to supply the Mudali firm with twenty-five bales of yarn (Exs. A and A-1). On 24th October, 1918, the Mudali firm wrote Ex. II cancelling the contract because the supply had been irregular. The Chetty firm not accepting this cancellation gave notice of suit ; and in due course filed O. S. No. 27 of 1919 in the Court of the District Munsif of Chittoor. The matter was referred to arbitration and apparently settled by award, but the award is not in evidence. Then on 9th December, 1919, the Mudali firm wrote Ex. D to the Chetty's firm that under the previous contract they were still bound to supply them with 11 1|2 bales, and if these were not supplied within two days, they would file a suit. Hence the present suit brought by the Mudali firm, the plaintiffs-appellants.

The point taken in this appeal is that the contract was never cancelled and the appellants rely for this position upon *Frost* v. *Knight* (1). There it is laid down, at page 112, that if one party to a contract repudiate it, the promisee may treat the repudiation as inoperative, and at the end of the period of the contract, treat the other party as responsible for all the consequences of non-performance, thereby keeping the contract alive, or, on the other hand, he may treat the repudiation as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it. The Chetty firm evidently adopted the latter alternative when it brought O. S. No. 27 of 1919. But relying upon a passage in the plaint of that suit the appellants would have it that the Chetties availed themselves of both alternatives. They sued upon the breach of the contract, and in the same breath kept it open. Because in paragraph 11 of their plaint there is a statement that they were

1. L R (1872) 7 Ex 111.

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still entitled to deliver the rest of the bales. The short answer to this is that they had no right to make any such reservation. *Frost* v. *Knight* (1) is a recognised authority prescribing the remedies open to a promisee, and he cannot both sue upon the breach and also keep the contract open.

The appellants then proceed to argue that, if so much must be conceded, the Chetty firm closed the first portion of the contract, but re-opened a new contract by their 11th paragraph. This plea can have no force unless the Mudali firm can show its acceptance of this fresh tender, and so far from accepting it, that firm in its written statement utterly repudiated the 11th paragraph as false (Ex. III, paragraph 11). Therefore there was no fresh contract between the parties.

Apart from contesting this plea of the plaintiffs the respondents have a good case as set forth in paragraph 8 of their written statement by way of waiver and estoppel. A party cannot repudiate a contract, wait a year, and then suddenly insist upon its performance. The question turns upon whether his conduct gives rise to an implication of abandonment [Cf. *Pearl Mill Company* v. *Ivory Tannery Company* (2)]. Delay coupled with repudiation does give rise to such an implication. "Where one party by acts and conduct evinces an intention no longer to be bound by the contract, the other party will be justified in regarding himself to be emancipated." Halsbury's Laws of England, Vol. VII, paragraph 865.

For the above reasons the appeal is dismissed with costs.

A. S. V. *Appeal dismissed.*

PRIVY COUNCIL

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Rajah Bhupendra Narayan Singh ... *Appellant**

v.

Narapat Singh ... *Respondent.*

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Rajah Bhupendra Narayan Singh v. Narapat Singh.

Putni settlement—Chaukidari chakran lands—Bengal Act (VI of 1870)—Resumption by Government, and transfer to Zamindar—Whether additional rent payable by Putnidars to Zamindar.

Upon resumption by the Government, under Bengal Act (VI of 1870) of chaukidari chakran lands forming part of a putni settlement, and transfer

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*P C Appeal No. 170 of 1924. 7th July, 1925.

1. L R (1872) 7 Ex 111. 2. (1919) 1 K B 78 at 85.

thereof to the Zamindar, the putnidar is entitled to *khas* possession of the lands, subject, however, to a corresponding right in the Zamindar to have an enhanced rent fixed in respect thereof in pursuance of the Act.

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Bejoy Chand v. *Krishna*, 34 C L J 275 referred to.

Ranjit Singh v. *Kali Dasi Debi*, (1917) 44 I A 117 and *Ranjit Singh* v. *Bahadur Singh*, (1918) 45 I A 162 distinguished.

Pryambada Debi v. *Monohar Mukhopadhya*, I L R 52 C 576 approved.

Appeal by special leave from one judgment and decrees, dated 27th February, 1922, of the High Court (Greaves and Ghose, JJ.), partly affirming and partly reversing the judgment and decrees, dated 13th September, 1919, of P. C. De, Esq., District Judge of Birbhum, who had affirmed the judgment and decrees of the Munsif of Rampurhat (Ramdulal Deb, Esq.), dated 30th September, 1910.

The facts and arguments are set out in the judgment of their Lordships.

Sir G. Lowndes, K. C. and *B. Dube* for appellant.

L. de Gruyther, K. C and *R. H. Hodge* for respondent.

7th July, 1925. The Judgment of the Board was delivered by

Lord Carson.

Lord Carson :—This is a consolidated appeal by special leave from one judgment and 18 decrees, dated the 27th February, 1922, of the High Court of Judicature at Fort William in Bengal. Each of the 18 decrees though relating to a distinct subject-matter raises the same question for decision. Each suit was a suit to recover possession from the defendant (who is the present appellant) the Zamindar of certain villages in Putni settlement of chaukidari chakran lands which had been resumed by the Government under the provisions of Bengal Act VI of 1870, and were transferred to the Zamindar subject to the payment of rent assessed on the lands in accordance with S. 51 of the Act. The plaintiffs (respondents) alleged that by a pattah, dated 13th November, 1853, the predecessors in title of the appellant Zamindar granted five villages in Putni settlement at the annual rent of Rs. 4,589, to one Krishna Chandra, from whom the plaintiffs derived title. It was further alleged by the plaintiffs and it is not now in dispute that at the time of the Putni settlement there were certain lands in every village which were chaukidari chakran lands, and were held and enjoyed by the Chaukidars in lieu of their salaries, and that such lands which had been transferred as aforesaid by the Collector form part of the lands of the Putnidar under the said pattah of 13th November, 1853. The appellant,

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on the other hand, denied that under the terms of the said pattah the plaintiffs had any title to the chaukidari chakran lands released by the Government, and that in any event the plaintiffs were not entitled to get possession thereof without paying some rent in addition to the annual rent of Rs. 4,589 fixed in the pattah.

All the suits were tried by the Munsif of Rampurhat, who by his judgment dated 30th September, 1910, held that the disputed property was included in Putni settlement, and that the plaintiffs were entitled to obtain *khas* or actual possession of the lands in suit, but that they could not do so without paying an additional rent to the Zamindar, and he concluded his judgment in the following terms :—

> "The plaintiffs' putni lease appears to cover all the lands within the boundaries of the mahals, but the profits of the Chaukidari lands were not taken into account in determining the rent payable by the Putnidar. The plaintiffs must be held to pay a higher amount for the resumed lands than that which has been assessed for Chaukidari purposes on these lands by the Collector as by the resumption the lands were enfranchised and the Putnidars would get the land free from the burden of the public service. The principle has been laid down in *Hari Narain Mozumdar v. Mukund Lal Mundal*(1) 'the Putnidar is bound to pay to the Zamindar such rent for these lands as corresponds to the proportion between the gross collection and the Putni rent formerly payable by him.'"

On an appeal and cross-appeal to the District Judge of Birbhum the decree and order of the Munsif was by a judgment of 13th September, 1919, affirmed. The plaintiff, now respondent, appealed to the High Court of Judicature against so much of the order as adjudged that the plaintiff should pay to the defendant No. 1 such increased Putni rent over the Doul Jumma as may be proportionate to the increase of the present collection over what it had been at the time at which the Putni Mahal was created. The learned Judges of the High Court allowed the appeals of the plaintiff and made decrees setting aside that part of the decision of the District Judge which declared the Zamindar entitled to obtain additional rents from the plaintiff, and the only question to be considered on the present appeal by the appellant Zamindar against the said order is as to whether such increased rent is or is not payable. It has not been disputed, and indeed it was so stated by the judgment of the High Court that by a long series of decisions the Zamindar's right to a share of the rents and profits in

1. (1900) 4 C W N 814.

addition to the amount payable to the chaukidari fund under the provisions of Act VI of 1870 was established :—

"These decisions," say the learned Judges, "have recently been considered and followed in the case of *Maharaja Bejoy Chand v. Krishna* (2) which was decided in December, 1920, and no useful purpose would, we think, be served by going through them again. They undoubtedly do support the contention urged before us on behalf of the Zamindar respondent and it is useless to suggest that they are in the main distinguishable from the cases before us."

The learned Judges, however, held that the series of decisions laying down this principle could no longer be supported having regard to the decisions of this Board in two cases, viz.: *Raja Ranjit Singh* v. *Kali Dasi Debi* (3) and *Ranjit Singh* v. *Maharaj Bahadur Singh* (4). Their Lordships cannot agree with the appellate Court that either of the cases referred to has the effect attributed to it by the learned Judges. In the first of these cases where it is to be observed the order was in substantially the same form as in the present case, all that this Board decided was that a putni grant by a Zamindar of his interest in lands includes his interest in chaukidari chakran lands within the boundaries of the grant, and that upon their being resumed and transferred to the Zamindar under the Bengal ActVI of 1870 the patnidar or darpatnidar holding from him is entitled under S. 51 of that Act to possession. The patnidar did not in that case challenge the validity of so much of the order appealed from as rendered the decrees for possession subject to the fixing of a fair and reasonable assessment. In giving the judgment of the Board Lord Parker of Waddington added : "It is a satisfaction to find that the view above expressed is that hitherto universally adopted in the Indian Courts."

In the second of the above-mentioned cases referred to by the Judges of the Appellate Court, the only point decided was that upon the transfer of chaukidari chakran lands situated within the villages to the Zamindar an action by the patnidars for declarations that such lands formed parcel of the patni mahal, and that they were entitled to a settlement and *khas* possession was not an action for specific performance of contract within Art. 113 of Sch. II of the Indian Limitation Act, 1877, but a suit for possession of immoveable property within Art. 114. Their Lordships can find nothing in the judgment in anywise affecting the point raised upon the present appeal.

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2. (1920) 34 C L J 275. 3. L R (1917) 44 I A 117 : 32 M L J 565 (P C).
4. L R (1918) 45 I A 162 : 35 M L J 728 (P C).

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Lord Carson.

The Board has examined the record in that case, and it is to be observed that the order appealed from as in the former case, recognised the right of the Zamindar to have a rent fixed for the chaukidari chakran lands in question, and this part of the order was not questioned or appealed from in the case before the Board, and the judgment appealed from was in their Lordships' opinion correct.

In a case decided by the High Court of Calcutta in *Pryambada Debi* v. *Monohar Mukhopadhya* (5) the learned Judges refused to follow the decision appealed from in the present case, holding that the Appellate Court had misread or had not appreciated the two judgments of the Privy Council on which they had based their decisions. Their Lordships agree with this view, and are of opinion that the Court below was in error in holding that the cases referred to before the Privy Council made any change in the law as to the right of the Zamindar to have a rent fixed under the circumstances existing in the present case. It was, however, argued in the present case before the Board that under S. 51 of Act VI of 1870, the patnidar is entitled to hold the lands rent free, or without paying additional rent for them. Their Lordships cannot accept this view. The peculiar character of chaukidari chakran lands, and how they came to be included, without paying rent, in the various patni pattahs, as is found in the present case, has been frequently discussed before the Board, as in the cases referred to and others and as Lord Buckmaster says in *Ranjit Singh* v. *Maharaj Bahadur Singh* (4) :—

"It does not follow that because the rights originally arose by virtue of a grant declared to be a contract within the meaning of S. 51 they are, therefore, rights, contractual in the sense that the contract by its terms creates and regulates the personal obligations and duties of the grantor in the circumstances that have arisen. At the time when the putni grants were made the resumption of the chaukidari chakran lands was not even contemplated, and the grant necessarily contains no reference whatever to the circumstances that would arise and the relationships that would exist in the event of the Government resuming possession."

Their Lordships, therefore, see no reason for interfering with the long series of authorities commencing as far back as the year 1900, which have established the right of the Zamindar to have an additional rent fixed for such lands, nor can their Lordships overlook the fact that in the cases already referred to before this Board no exception was taken by the

4. L R (1918) 45 I A 162 : 35 M L J 728 (P C).
5. (1924) I L R 52 C 576.

putnidar to the fixing of such rents as a condition of being put into possession.

Their Lordships are therefore of opinion that this appeal should be allowed, that the decrees appealed from should be set aside, except so far as they confirm the decrees of the Lower Appellate Court, and that such last-mentioned decrees should be restored. The respondent should pay the costs of this appeal and of the appeals in the High Court. Their Lordships will humbly advise His Majesty accordingly.

P. C.

Rajah Bhupendra Narayan Singh *v.* Narapat Singh.

Lord Carson.

Solicitors for appellant : *W. W. Box and Co.*

Solicitors for respondent : *Gush, Philips, Walters and Williams.*

A. de M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Chandayya Hegdé ... *Appellant in all cases** (*Defendant*)

v.

Kaveri Hegadthi and others ... *Respondents* (*Plaintiffs*).

Chandayya Hegde *v.* Kaveri Hegadthi.

Aliyasantana Law—Maintenance—Separate maintenance—Award of—Grounds—Inconvenience—Disputes between ejman *and plaintiffs—Award on ground of—Propriety—Rate of separate maintenance—Data for fixing—Members living away with their husbands or wives for portion of year—Amount equivalent to maintenance during period of absence—Claim to—Maintainability.*

In a suit for maintenance brought against the *ejman* of an Aliyasantana family by some of the members thereof, the Court below awarded the plaintiffs separate maintenance on the ground that the defendant and the plaintiffs were not moving well and that a joint mess in the family house had become extremely inconvenient.

Held, that mere inconvenience was not sufficient to warrant separate maintenance.

Held further, that the existence of disputes between the *ejman* and the plaintiffs was not a ground for awarding separate maintenance when there was no evidence to show that those disputes had been of such a nature as to make it impossible or dangerous for the members to continue to live together in the same house and take meals together.

The *ejman* is not bound to distribute any spare money that he has in his pocket among all the other members or even among some of them.

When some members of an Aliyasantana family reside away for a portion of the year with their husbands or wives, as the case may be, they are not entitled to claim from the *ejman* a sum equivalent to their maintenance during the period of absence.

In fixing the rate of separate maintenance to be awarded to members of such a family, the Court must take into account the right of the karnavan to

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* S. A. Nos. 1416 to 1418 of 1923. 3rd August, 1925.
C. M. P. Nos. 2637 and 2638 of 1925.

Chandayya Hegde v. Kaveri Hegadthi.

something more than an equal share and the right of those members who continue to live jointly in the family house to enjoy the same mode of living as they formerly enjoyed subject only to the rights of those who have separated from the family.

Second Appeals against the decrees of the Court of the Subordinate Judge of South Kanara in A. S. Nos. 167, 166 and 165 of 1922 preferred against the decrees of the Court of the District Munsif of Udipi in O. S. Nos. 133, 134 and 135 of 1920 respectively.

Petition praying that in the circumstances stated therein the High Court will be pleased to dismiss the S. A. No. 1416 of 1923 without costs as the disputes between the parties to it have been settled in pursuance of a compromise referred to in the affidavit filed in C. M. P. No. 2638 of 1925 on the file of the High Court praying for leave to compromise detailed in the affidavit filed herewith as being beneficial to the minor respondents Nos. 8 to 10 in the said S. A. No. 1416 of 1923.

B. Sitarama Rao for appellant.

K. Y. Adiga for respondents.

The Court delivered the following

JUDGMENT :—These three suits are brought for maintenance against the 1st defendant who is the *ejman* of the Aliyasantana family to which the plaintiffs belong. Separate maintenance is claimed in all the three suits on the ground that the defendant had refused to maintain the plaintiffs. Both the Courts have found that this case is untrue and that there was no refusal by the defendant to maintain the family but both the Courts have given a decree for maintenance. The Lower Appellate Court has held that "defendant and the plaintiffs are not moving well and that a joint mess in the family house has become extremely inconvenient," and on that ground has awarded separate maintenance. The right of a member of an Aliyasantana family to maintenance in the *tarwad* house is undoubted and under certain circumstances he is entitled to separate maintenance outside. It has been held that when a wife goes to live with her husband or when a husband goes to live with his wife in a separate house they are entitled to separate maintenance [vide *Maradevi* v. *Pammakka* (1), *Kunchi* v. *Ammu* (2), *Muthu Amma* v. *Gopalan* (3) and *Govindan Nair* v. *Kunju Nair* (4)]. But it is not suggested in these

1. (1911) I L R 36 M 203 : 22 M L J 309.
2. (1912) I L R 36 M 591 : 24 M L J 559.
3. (1912) I L R 36 M 593 : 23 M L J 496.
4. (1919) I L R 42 M 686.

Chandayya Hegde v. Kaveri Hegadthi.

cases that any of the members has gone to reside separately for any proper purpose. One Seshappa, the head of the branch which brings the Suit No. 133 of 1920 did apparently leave the *tarwad* house for a year or two but he admits that he returned there when he found that both his branch and the other two branches were being treated alike. It is not suggested that any of the other members has gone away to live separately, except temporarily and from time to time. It is now urged for respondents that they are entitled to separate maintenance because of the quarrels that have taken place in the family. There have been suits between the *ejman* and some members of the family and also one suit between two branches of the family, but there is no evidence to show that these disputes have been of such a nature as to make it impossible or dangerous for the members to continue to live together in the same house and take meals together. The Lower Appellate Court has merely found that their living together was extremely inconvenient. It has been pointed out in *Kunchi* v. *Ammu* (2) that the right to separate maintenance cannot be put on the mere ground that there is no such complete harmony in the house as to ensure the happiness of the claimant. Mere inconvenience therefore is not sufficient to warrant separate maintenance. It may be observed that the Lower Appellate Court does add to these reasons the following : " I therefore agree with the Lower Court in holding that the plaintiffs are entitled to claim separate maintenance, " and he must be deemed to have adopted the District Munsif's reasoning. When we look at the findings of the District Munsif we see nothing more definite than the finding of the Subordinate Judge. The District Munsif elaborately discusses the evidence and finds the plaintiffs are not debarred from claiming maintenance, but the mere fact that they are not debarred in suitable circumstances from so claiming is no evidence that such suitable circumstances do exist and that point he has not considered, his main ground being that the defendant had refused to permit the plaintiffs to " freely participate in the family income. " Defendant had acted up to the terms of a family *karar* which defined the rights of the parties and it was not incumbent on him to distribute any spare money that he had in his pocket among all the other members or even among some of them. Similarly the District Munsif seems to think that when some

2. (1912) I L R 36 M 591 : 24 M L J 559.

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members resided away for a portion of the year with their husbands or wives, as the case might be, they were entitled to claim from the *ejman* a sum equivalent to their maintenance during the period of absence. Such a right has certainly never been recognised by the Courts and the District Munsif gives no authority for his opinion. Even, therefore, if we take the findings of the District Munsif together with those of the Subordinate Judge, no adequate reasons have been given for awarding separate maintenance in these suits. In view of these findings it is unnecessary for me to say anything about the rate of maintenance; but I would point out that the Subordinate Judge has given very inadequate reasons for rejecting the actual income shown in the leases and accepting in preference some vague estimate of what the yield would have been and the price that it would have fetched. He has also divided the income into exactly equal shares for each person and allotted it accordingly, not taking into account the right of the karnavan to something more and the right of those members who continued to live jointly in the family house to enjoy the same mode of living as they formerly enjoyed subject only to the rights of those who have separated from the family.

Second Appeal No. 1416 of 1923 has been compromised as between the defendant and all the plaintiffs except the 3rd. There will be a decree in accordance with that compromise and also be a decree dismissing the suits with costs throughout, the costs in S. A. No. 1416 being met by the 3rd plaintiff alone.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Thutta Venkataswami ... *Appellant* (Petitioner—1st defendant)*

v.

Vissamsetti Kotilingam and another ... *Respondents (Counter-petitioners).*

Venkataswami v. Kotilingam.

Civil Procedure Code, O. 21, R. 2—Adjustment of decree—Composition scheme between judgment-debtor and creditors generally—Decree-holder party to such scheme—Payment by judgment-debtor as per scheme—If adjustment of decree—Recording of full satisfaction under O. 21, R. 2—Decree-holder if can resile from scheme.

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*A A A O No. 57 of 1923. 30th April, 1925.

Where a decree-holder agrees under a mutual composition scheme to accept payment of 80 per cent. of his debt in full satisfaction thereof, if paid within a reasonable time, and the debtor makes the payment within a reasonable time, there is an adjustment of the debt tantamount to full satisfaction of the decree ; and the judgment-debtor is entitled to plead that as a full defence to any execution application, and to have that full satisfaction recorded under O. 21, R. 2, Civil Procedure Code.

When there has been a mutual composition scheme between the judgment-debtor and the creditors, it is not open to a single creditor to resile therefrom.

Appeal against the order of the Court of the Subordinate Judge of Kistna at Ellore in A. S. No. 244 of 1922 against the order of the Court of the Principal District Munsif of Ellore, dated 25th February, 1922, in I. A. No. 4236 of 1921 in O. S. No. 667 of 1921.

V. Govindarajachari for appellant.

V. Suryanarayana for respondents.

The Court delivered the following

JUDGMENT :—The question for decision in this appeal is whether an agreement by a decree-holder in a composition by his judgment-debtor with his creditors generally to accept a percentage of his decree debt in full satisfaction of the whole debt is an adjustment which can be recorded under O. 21, R. 2 as an adjustment of the decree. The Lower Appellate Court has held that it could not be recorded, and the appellant (the judgment-debtor) appeals.

The respondent, who is the transferee from the original decree-holder, at one stage of his argument, challenged the existence of any composition, but both the Lower Courts have held on the evidence that there was a composition between the judgment-debtor and his creditors, under which they agreed some of them to accept 75 per cent. of their debt and some 80 per cent. in full satisfaction, and the present decree-holder was in the latter class. He had filed an execution petition for the whole decree amount on 14th September, 1921, but dropped it after the composition agreement. It is quite clear that he was a party to that mutual agreement. That the present transferee-respondent was also aware of the composition is clear from the fact that the sum for which the decree was transferred to him was not the full amount of the decree, but practically the amount which the decree-holder under the composition had agreed to take.

This composition was in October, 1921, about one month after the decree. On 18th November, 1921, the judgment-

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debtor, the appellant, deposited into the first Court the amount due to his decree-holder under the adjustment on the footing of the decree, that is, 80 per cent. of the full amount due. It appears from the evidence that the money was first tendered to the decree-holder but he said that he had already transferred the decree to the present 1st respondent. It does not appear that the money was then tendered to the 1st respondent, but it was paid into Court by the judgment-debtor on 18th November, 1921, along with his application to record satisfaction, to which application both the original decree-holder and the transferee were made parties. This deposit was mentioned by the judgment-debtor in his affidavit in the I. A. dated 16th November, 1921, and this fact was not controverted either by the decree-holder or his transferee. I am asked to remand the case for a finding as to the tender but it is unnecessary, since to the knowledge of both these parties the money was deposited into the Court for payment to the party entitled to execute. If the adjustment therefore can be pleaded as a bar in execution, the amount which the decree-holder had agreed to accept in full discharge of the decree was paid into Court on 18th November, 1921. No time was fixed under the composition for payment, but one month after the composition is certainly a reasonable time.

That a mutual agreement by creditors to accept a less sum than their full debts in full discharge of their debts is an enforceable contract in this country is not, I think, open to doubt. The illustrations to S. 63 of the Indian Contract Act seem to me to make this clear. On the other side, it is argued that that section itself implies an original contract to which there was a promisor and a promisee ; but I do not think the language used must necessarily import more than an ordinary obligation and implied promise of a debtor to pay back his creditor. Illustrations (*b*), (*c*) and (*e*) are, so far as appears from the language used, ordinary debts and not debts due under any contract. When the illustrations allude to a specific contract debt it is so specifically stated—*see* Illustration (*d*). Illustration (*e*) is practically conclusive for the purpose of this case, that such a composition with creditors is an enforceable contract, though in the case of illustrations (*b*) and (*c*) there may be no new contract created, and though until actual tender of payment, it may be still open to the creditor to refuse to accept part payment in full satisfaction, a case analogous to that in the decision of the Calcutta High Court reported in

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Debendra Narain Sinha v. *Sourindra Mohan Sinha* (1). In the case of illustration (*e*) there is a fresh contract for which there is consideration, namely, the agreement of other creditors also to be content with part-payment and thus release money for the discharge of other debts.

Now, if that is the position in the case of an ordinary debt, I fail to see how it is changed when the debt is embodied in a decree. In either case, the arrangement is an adjustment of the debt due, though it cannot be enforced unless certified, [vide *Veerappa Chettiar* v. *Arumugam Poosari* (2) and the *ratio decidendi* of *Periathambi Udayan* v. *Vellaya Goundan* (3)], and payment in terms of the adjustment will be under the terms of its full satisfaction for the debt. It is contended that parties to a decree cannot vary their decree right. This seems tantamount to saying that there can be no adjustment of a decree. Adjustment is clearly not the same thing as satisfaction. If R. 2 of O. 21 meant to say that the decree is otherwise satisfied in whole or in part it would have said so. Adjustment is some method of settling the decree which is not provided for in the decree itself. If the decree-holder can still execute the decree in full in spite of the adjustment, then there has been no adjustment at all. This seems to me therefore clearly a case to which O. 21, R. 2 applies.

The respondent, however, further pleads that the decree-holder is entitled to resile from the adjustment if he likes, and that, if he resiles, then the decree has not been adjusted, to use the words of the rule, "to the satisfaction of the decree-holder." As noted above, such a result may be permissible when there has been no mutual composition between the judgment-debtor and the creditors ; but when there is this composition, it is not open to a single creditor to resile from the fresh contract. The respondent contends that, even if that be so, the method of enforcing the contract on him is not by forcing him to abide by the execution proceeding, but by leaving the judgment-debtor to sue him for damages for breach of contract ; and this is the view that the Lower Appellate Court has taken. If this fresh contract is, as I hold, an adjustment of the debt, I cannot see why such an adjustment should not be recorded. That is the purpose of the rule, unless the unfortunate debtor, after he has secured his composition, is then thrown into the position of having to sue any and every creditor

1. (1914) 24 I C 391. 2. (1907) 17 M L J 527.
3. (1897) I L R 21 M 409 : 8 M L J 51

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who chooses to resile from the composition. An adjustment of that sort would be worse than no adjustment at all. The adjustment when made was "to the satisfaction of the decree-holder," and that is what is meant by these words when used in the rule.

The next point taken is that the tender was not made to the transferee and that it will not bind him. This again cannot be upheld. The transferee succeeds to the contract made by his transferor and is bound to accept whatever the transferor was bound to accept. In this case I think it is clear that the decree-holder agreed under a mutual composition scheme to accept payment of 80 per cent. of his debt in full satisfaction of his debt, if paid within a reasonable time ; and the money was paid within a reasonable time. This, therefore, was an adjustment of the debt tantamount to full satisfaction of the decree, and the judgment-debtor is entitled to plead that as a full defence to any execution application and to have this full satisfaction recorded under O. 21, R. 2.

I, therefore, reverse the order of the Lower Appellate Court and restore that of the District Munsif with costs here and in the Lower Appellate Court. The transferee decree-holder may draw out the money deposited by the petitioner in the First Court.

A. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Thayammal ... *Appellant** (*Plaintiff*)

v.

Perumal Chetti and another ... *Respondents* (*Defts.* 2 & 3).

Thayammal v. Perumal Chetti.

The Indian Trusts Act, Ss. 5, 6—Trust—Specific property necessary—Document purporting to be a will—Not signed by testator—Joint Hindu family—Proof of assent—Oral will.

The plaintiff, alleging that her deceased father had deposited a sum of Rs. 4,000 with the 1st defendant out of his self-acquisitions and directed his brothers, 2nd and 3rd defendants, to pay her marriage expenses out of that amount and hand over the balance to her on attaining majority, sued for the recovery of the same as on accounts. The arrangement pleaded by her was referred to in a document purporting to be a will of her father, but not signed by him and at the end of it there was a recital that as it had become impossible for him to sign the document when it had been written out, his brothers agreed to act in accordance with the recitals contained therein. Defendants 2 and 3

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*S A No. 14 of 1923. 6th August, 1925.

had signed the document. The Courts below found that the plaintiff's father had no self-acquisitions, that he and his brothers were members of an undivided family whose whole property was held as joint family property, and that there was no entrustment to the 1st defendant. But holding that defendants 2 and 3 were trustees, a decree was given against them. *Held*, there was no specific property assigned in trust for the plaintiff, but only a sum of money to be paid to her out of family properties. In order to constitute a trust there must be a trustee with an express trust and an estate or interest in lands vested in the trustee and which the trust must affect. At the most the arrangement merely created a charge and a liability in favour of the plaintiff, which should be enforced within the ordinary period of limitation.

The document embodying the arrangement was not an effective will, as it was a devise of family property by a member of a joint Hindu family. Not having been signed by the testator or assented to by him, it did not evidence an oral will either. The agreement evidenced by it was merely a voluntary agreement on the part of defendants 2 and 3 and in the absence of consideration it was not legally binding on them.

Second Appeal against the decree of the District Court of North Arcot at Vellore in A. S. No. 149 of 1920 preferred against the decree of the Court of the Temporary Subordinate Judge of Vellore in O. S. No. 72 of 1917.

A. Krishnaswami Aiyar for appellant.

T. M. Krishnaswami Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The appeal only deals with the question of interest, but a Memorandum of Objections has been filed by respondents 1 and 2, defendants 2 and 3 in which the whole decree is sought to be impeached and it will be necessary to deal with the Memorandum of Objections first.

The plaintiff is the daughter of one Ramu Chetti, whose brothers, Perumal Chetti and Gopal Chetti, are defendants 2 and 3. In her plaint she alleges that her father deposited with Madar Saheb, 1st defendant, a sum of Rs. 4,000 out of his self-acquisitions and directed that defendants 2 and 3 should, out of the said sum and its interest, pay the plaintiff's marriage expenses and hand over the balance to her on her attaining majority. Both the Lower Courts have found that Ramu Chetti had no self-acquisitions and that he and his two brothers were members of an undivided family whose whole property was held as joint family property. It has also been found that there was no entrustment to the 1st defendant, whose legal representatives are consequently not impleaded here. In the plaint the plaintiff states that the arrangement pleaded by her was referred to in a will executed by her father. This

Thayammal v. Perumal Chetti.

will is Ex. A, dated 28th January, 1906. It is not signed by Ramu Chetti, but at the end of the document we have the recital " as just when writing of this will was finished, it became impossible to sign it as referred to above, Nos. 1 and 2 agree to act as stated in the will. " This is signed by defendants 2 and 3. By that recital they undertook within two years from the date of the document to marry the plaintiff and to pay her for her *stridhanam* Rs. 3,794-0-6 out of their self-acquired and ancestral properties. Both the Courts have found that the arrangement was as recited in Ex. A and it is in evidence that on the date of the will the 1st defendant was indebted to Ramu Chetti's family in the said sum of Rs. 3,794-0-6. The Lower Appellate Court has exonerated the 1st defendant and his legal representatives, but has held that defendants 2 and 3 are trustees, and are bound to repay this sum with interest from the date of the plaintiff's marriage. It is now argued that the Lower Appellate Court is wrong in holding that any trust was created and I think this contention must be upheld. No specific property was assigned in trust for the plaintiff, but a sum of money was to be paid to her out of the whole family property of defendants 2 and 3. The entrustment to 1st defendant having been found against, it follows that there was no specific money or property which was assigned in trust. The Lower Court also finds that the suit is one for an account but gives no reasons for this finding and I do not understand how a suit to recover a specific sum of money with accumulated interest can be deemed to be a suit for an account.

As pointed out in *Cunningham* v. *Foot* (1), to constitute a trust " there must be a trustee with an express trust and an estate or interest in lands vested in the trustee and which, therefore, the trust must affect ". In that case an annuity was bequeathed to the testator's wife to be paid " out of all profits arising from all and every part of my estate and property whatsoever " and it was held that although this might create a charge and a liability in favour of the annuitant, the charge and the liability together do not amount to an express trust or establish fiduciary relations which such a trust implies, because the charge was general and the liability affected everything bequeathed or devised. The very same arguments appear to be applicable in the present case; the bequest, if any, to the daughter was to be made out of the whole family property

1. L R (1878) 3 A C 974 at 993.

Thayammal v. Perumal Chetti.

and no specific property was set apart as trust property. I may also refer to *Henry* v. *Hammond* (2). At page 521 Channel, J. observes : "It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund of the person entitled to it, then he is a trustee of that money...........If, on the other hand, he is not bound to keep the money separate but is entitled to mix it with his own money and can deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money but merely a debtor." If there is no trust, the plaintiff's suit would be barred by limitation. Under Ex. B the money was to be paid within two years from 28th January, 1906, and consequently the plaintiff's cause of action accrued on 28th January, 1908. She was then a minor, but it has been found that she has brought this suit more than three years after attaining her majority. The suit is therefore barred by limitation.

It is then contended for the plaintiff that Ex. A is an effective will. In the first place a member of an undivided family has no power to devise property by will. In the second place the will has not been executed, as it is not signed by the testator. As regards the second point it is urged that even an unsigned will may be effective. Reliance is placed on the ruling in *Tara Chand Bose* v. *Nobeen Chander Mitter* (3), but in that case not only was the unsigned document produced, but there was also evidence of the witnesses who were present when it was drawn up that will was drawn up according to the instructions of the testator, and that he signified in their presence his assent thereto. This would in effect be good evidence of an oral will. Such circumstances and evidence are absent in the present case, for, there is no suggestion that the testator assented to the terms of Ex. A before he died or that he made any oral will.

As regards the first point reliance is placed on the decision of a Bench of this Court in *Patra Chariar* v *Srinivasa Chariar* (4) where it was held that a father in a joint Hindu family can, with the consent of his adult son and with the consent of his relations who are interested in his minor son, bequeath a portion of his ancestral property to his daughter pro-

2. (1913) 2 K B 515. 3. 3 W R (Civil) 138.

4. (1917) I L R 40 M 1122 : 32 M L J 364.

Thayammal v. Perumal Chetti.

vided the portion is reasonable in extent. The validity of this decision has been questioned in a later case [*Subbarami Reddi* v. *Ramamma* (5)], but not definitely dissented from on the ground that the testator obtained the consent of all his coparceners. In the present case it is alleged that there were sons of defendants 2 and 3 in existence on the date of the will and we have no evidence that the assent of their guardians was obtained. The decision in *Patra Chariar* v. *Srinivasa Chariar* (4) is not therefore applicable to the facts of the present case. I may also add with reference to the claim based on the will, that no such claim is put forward in the plaint, the plaint being based entirely on an arrangement. It is unnecessary to decide the point but it appears to me that the agreement evidenced by Ex. A being purely a voluntary agreement on the part of defendants 2 and 3 for there is no evidence that they obtained any consideration for it, it would not be legally binding upon them, although they might be under a moral obligation to pay the money. It would appear that defendants 2 and 3 were willing to pay the amount decreed against them for they did not appeal against the decree and offered to pay plaintiff the money if 1st defendant would pay them. Unfortunately the plaintiff has been sufficiently ill advised as to press her claim for further interest and consequently has given the defendants an opportunity of setting aside the whole decree, but possibly they may yet recognise their moral obligation to pay the plaintiff some money as *stridhanam*.

In the result the Memorandum of Objections must be allowed and the second appeal dismissed. The plaintiff's suit is dismissed with costs throughout.

T. S. V. *Appeal dismissed ; Memorandum of Objections allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

Gandha Korliah ... *Appellant** (*Plaintiff*)

v.

Janoo Hassan ... *Respondent* (*Defendant*).

Gandha Korliah v. Janoo Hassan.

Shipping—Charterparty—Ship under charter if a common carrier—Frustration of venture—Advance freight—If recoverable—Law applicable—English and Indian Law.

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*O S Appeal No. 83 of 1924. 24th August, 1925.

4. (1917) I L R 40 M 1122 : 32 M L J 364.

5. (1920) I L R 43 M 824.

Gandha Korliah v. Janoo Hasan.

Under the terms of a charterparty to carry rice from Akyab to the Coromandel Coast, the charterer paid a certain sum of money as advance, which was to be deducted from the freight of a second trip. At that time importation of rice was allowed only after obtaining a certificate from the Food Comptroller. Both parties knew this and there was no guarantee that such a certificate would be forthcoming. The execution of the contract became impossible as the Food Comptroller did not grant the necessary certificate and thereupon the shipper claimed refund of the advance paid.

Held, the general principle of the Indian Contract Act applied and the advance could be recovered on the frustration of the venture.

The inability in England to recover advance freight on the frustration of the venture is derived from the general principles of the Common Law and not from any supposed peculiar incident attaching to maritime contracts of affreightment.

Quaere.—Whether a ship under charter as distinct from a general ship taking the goods of several shippers under separate bills of lading on the same voyage can be properly described as a common carrier ?

Case-law discussed.

On appeal from the judgment of the Hon'ble Mr. Justice Waller passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 9 of 1923.

S. Srinivasa Aiyar for appellant

K. Sundara Rao for respondent.

The Court delivered the following

JUDGMENT :—This case raises a point of some interest that has been much discussed in the English Courts and has very recently been the subject of a decision by Mr. Justice Macleod, as he then was, sitting in the High Court of Bombay. [*Boggiano and Co.* v. *The Arab Steamers Co., Ltd.* (1)]. It is not disputed by the appellant that if Mr. Justice Macleod's judgment is correct he is out of Court. The defendant was the owner of two steamers which were chartered by the plaintiff for the carriage of rice from Akyab to the Coromandel Coast. The importation of rice was only permitted—and Mr. Justice Waller, the Trial Judge, has very rightly found that this was a fact perfectly within the knowledge of the parties—if and when a certificate could be obtained from the Food Comptroller. The learned Judge has also rightly found—and this part of his judgment is not challenged—that neither party to the contract committed himself to a guarantee that such a certificate would be forthcoming. As to that no question arises and the learned Judge therefore thinks that the execution of the contract became impossible owing to an act which is neither under the

1. (1915) I L R 40 B 529.

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control of the parties nor which they had put themselves in the position of having warranted to be in existence, namely, the certificate. In these circumstances the shipper says that he is entitled to be paid back certain moneys which he had paid to the shipowner and these moneys are described in the contract as being paid for freight at the rate provided for in the charterparty.

"1. Rs. 450 only advance on acceptance of charterparty and to be deducted from the freight of second trip.

"2. Half of the freight to be paid as the vessel reaches Akyab and takes the cargo.

"3. The balance freight to be paid as the vessel reaches the port of destination."

It is sought to be said by the appellant in this case that this contract between the parties is not to be regarded as being governed by the general law of India laid down in the Contract Act but by the English Common Law. The appellant's vakil has very properly accepted the position that in circumstances such as the present the money that passed from one hand to the other is recoverable by Indian Law but irrecoverable by the English Common Law. If that were all that was to be said about it, it is quite plain that we should have to be guided by the Statute Law that obtains in this country and should not be justified in going past the Indian Statute to the English Common Law; but a very ingenious argument is put forward, the same argument that was really put forward in the Bombay case. It is said that a ship in this position is a common carrier and that in accordance with the decision of the Privy Council in *The Irrawaddy Flotilla Company* v. *Bugwandas* (2) the contract between the parties is not to be supposed to be governed by the Indian Contract Act but by the English Common Law regarding the liabilities and rights of common carriers. It is said that the moment you show that a person is a common carrier you have proved the existence of a certain type of contract of a special kind which, according to the Privy Council decision, is not governed by the provisions of the Indian Contract Act. There appear to me to be two objections and the first is this: that it is more than doubtful whether a ship under charter as distinct from a general ship taking the goods of several shippers under separate bills of lading on the same voyage is properly described as a common carrier at all. It is not necessary to decide that point fortu-

2. (1891) I L R 18 C 620 (P C).

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nately in this case but it is one that has been frequently discussed in commercial circles and amongst commercial lawyers for the past 70 years and there are a very considerable number of expressions of opinion by eminent commercial lawyers on the Bench that a chartered ship is not a common carrier. If that be right, the appellant's case is ended at once. It appears to me that we can put the case on an even more solid footing than that in the following way. Let us assume that in a contract of carriage by sea all those features which are peculiar to the contract of affreightment are governed by the English Common Law and therefore would not be touched even in this country by the provisions of the Indian Contract Act But there are other incidents in the relation of ship-owner and shipper in a contract of affreightment which are in no way peculiarly confined to a contract of affreightment and which are independent of the special provisions of maritime law. That that is so, I think, is clear from many of the cases which were cited before us, so that the question narrows itself down to this, is money paid in the present circumstances by way of an advance freight a special feature of a contract of affreightment deriving all its validity and force from the law maritime or does it derive its validity and force from the general English Common Law? The answer is to be found in the decision of the Divisional Court in *Blakeley* v. *Muller and Co.* (3) which is reported as a foot-note to the *Civil Service Co-operative Society, Ltd.* v. *The General Steam Navigation Company* (4). There Channel, J., dealing with one of the Coronation cases as they are commonly called, expressly says that it is an incident of the English Common Law and says that it is the same principle of the Common Law which prevents the refunding of advance freight on a charterparty where the voyage is not completed and the freight therefore not earned. That way of putting it was assented to in the judgment of the Earl of Halsbury, L. C., Lord Alverstone, C. J. and Cozens-Hardy, L. J. where, after citing the passage which I have read, the Earl of Halsbury, L.C. says he concurs with every word of that. If that be the right principle that was laid down by Channel, J. it follows that the inability in England to recover advance freight on the frustration of the venture is derived from the general principles of the common law and not from any supposed peculiar incident attaching to maritime contracts of affreightment. That being so, even if a chartered ship is a common carrier, the answer would

3. (1903) 88 L T 90. 4. (1903) 2 K B 756 at 760.

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be that matters relating to the recoverability of freight paid in advance although they happen to occur in a charterparty which is a maritime document of affreightment are nevertheless to be regarded as being regulated by the ordinary common law or statute law, whether English or Indian. Then you get back to this position : that being the common law of the land or the statute law of the land—and the general principle is different in India from what it is in England—therefore, just as we should apply the common law in England, so we should apply the express statute that obtains in India. It therefore seems to me that we should take the view that, whether a chartered ship is a common carrier or not, nevertheless the general principle of the Indian Contract Act applies and advance freight when paid can be recovered back by the shipper on the frustration of the venture. That appears to be in accordance with the view expressed by Phillips and Odgers, JJ. in *Sivanadian Chettiar* v. *Batchu Surayya* (5). Our decision is also in accordance with that in *Boggiano and Co.* v. *The Arab Steamers Co., Ltd.* (1) with which we respectfully agree. The appeal will be dismissed with costs.

T. S. V. *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Alaga Pillai ... *Appellant** (*1st Respondent in S. A. No.* 834 *of* 1921 *on the file of the High Court—Plaintiff*)

v.

Ramaswami Thevan and others ... *Respondents* (1 *to* 4 *Appts. and 2nd Respondent in S. A. No.* 834 *of* 1921—*Defts* 1 *to* 5).

Alaga Pillai v. Ramaswami Thevan.

Evidence Act, S. 116—*Landlord and tenant—Notice of eviction by Government under S.* 7, *Madras Land Encroachment Act—Tenant paying assessment and accepting patta from Government—Effect of—Suit by original landlord—Plea of* jus tertii—*If can be set up—Estoppel.*

The defendants were originally let into possession of certain property by an ancestor of the plaintiff. Subsequently the Government served on them a notice under S. 7 of the Madras Land Encroachment Act, whereupon they paid

*Letters Patent Appeal No. 28 of 1924. 11th September, 1925.

1. (1915) I L R 40 B 529.

5. (1924) 48 M L J 415.

the assessment due under the Act and accepted patta from the Government. The plaintiff did not challenge by suit the right of the Government to take proceedings under the Land Encroachment Act, but instituted a suit in ejectment against the defendants, whereupon the latter pleaded that the title to the lands was in the Government. *Held,* S. 116 of the Indian Evidence Act did not bar such a plea being set up.

It is only so long as the original tenancy is subsisting that a tenant is not allowed to set up the title of a third person. Where, however, the true owner has evicted the tenant, the latter could attorn to such true owner and set up his title in answer to a suit in ejectment by his original landlord. The eviction by the true owner need not be by actual dispossession. Where on a notice being issued under S. 7 of the Madras Land Encroachment Act, the person in possession pays the assessment and accepts patta from the Government, it amounts to eviction and thereafter the tenant does not remain a tenant of the original landlord. In such a case the landlord who let him into possession originally cannot rely on the law of estoppel contained in S. 116 of the Evidence Act as preventing his former tenant from pleading *jus tertii.*

Appeal under cl. 15 of the Letters Patent against the judgment and decree of the Honourable Mr. Justice Wallace in Second Appeal No.834 of 1921 preferred against the decree of the Court of the 3rd Additional Subordinate Judge of Tanjore at Mayavaram in Appeal No. 5 of 1920 preferred against the decree of the Court of the District Munsif of Shiyali in Original Suit No. 357 of 1918.

S. Muthiah Mudali for appellant.

C. A. Seshagiri Sastri for respondents.

The Court delivered the following

JUDGMENT :—This appeal is against the judgment of our learned brother, Wallace, J., allowing Second Appeal No. 834 of 1921. The only point in this appeal is whether S. 116 of the Indian Evidence Act is a bar to the plaintiff's suit. It is found that the defendants were let into possession of the plaint property 40 years before the suit by the plaintiff's paternal grandfather. The plaintiff brought the suit for ejecting the defendants from the possession of the plaint property. The District Munsif of Shiyali dismissed the suit as being barred by limitation.

On appeal the Additional Subordinate Judge of Tanjore at Mayavaram set aside the decree of the District Munsif and gave a decree to the plaintiff for possession of the property and directed him to pay Rs. 400 as compensation being the value of the house on the suit property. Wallace, J. set aside the decree of the Subordinate Judge and restored that of the District Munsif. The plaintiff has preferred this appeal.

Alaga Pillai v. Ramaswami Thevan.

Mr. Muthiah Mudaliar for the appellant contends that the defendants were not entitled to set up the title of the Government in answer to the plaintiff's suit. His argument is that the plaint land is a portion of Survey No. 498 and that he is the owner of the whole survey number though he paid tax only for the trees standing thereon, and the defendants having been let into possession by the plaintiff's predecessor-in-title are bound to deliver possession to the plaintiff. Under S. 116 of the Indian Evidence Act no tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immoveable property. No tenant can set up a *just tertii* in a third person in answer to a suit by the landlord. But it is well settled that where the true owner evicts the tenant, the tenant could attorn to the true owner and set up the title of the true owner in answer to a suit for ejectment by the landlord who let him into possession. So long as his tenancy is subsisting the tenant is not entitled to set up the title of a third person. But if he is evicted from the possession of the land by the true owner then the tenancy ceases and after the eviction he could attorn to the true owner. The eviction need not be by actual dispossession of the tenant. If the true owner is armed with a legal process for eviction which cannot be lawfully resisted even though the tenant is not put out of possession the threat to put him out of possession amounts in law to eviction. In this case the Government served upon the defendants notice Ex. III (*b*) under S. 7 of the Madras Land Encroachment Act (III of 1905). The Land Encroachment Act provides means by which persons in unauthorised occupation of Government land may be evicted. Under S. 7 before taking proceedings under S. 5 or S. 6 the Collector or Tahsildar or Deputy Tahsildar, as the case may be, shall cause to be served on the person reputed to be in unauthorised occupation of land being the property of Government a notice specifying the land so occupied and calling on him to show cause before a certain date why he should not be proceeded against under S. 5 or under S. 6. Under S. 3 any person unauthorisedly occupying any land which is the property of the Government shall be liable to pay the full assessment imposed on the land. Under S. 5 a person in unauthorised occupation of land belonging to Government may be made liable to pay what is known as penal assessment. Under S. 6 any person

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unauthorisedly occupying any land for which he is liable to pay assessment under S. 3 may be summarily evicted by the Collector. Ex. III (*b*) is a notice issued under S. 7 and on the failure of the defendants to comply with the terms of the notice eviction would have followed as a matter of course. The defendants paid the assessment and a year before the suit was brought they accepted patta from the Government. Ex. III (*b*), the notice under S. 7 of the Madras Land Encroachment Act (III of 1905) amounts in law to eviction. If the plaintiff had title to the land he should have brought a suit against the Government for a declaration that the land is his and for the recovery of the penal assessment levied from him as well as from his tenants. He did not take any action against the Government. The explanation given by Mr. Muthiah Mudaliar is that the plaintiff was a minor at the time and he attained majority only within three years before the suit. But that would not save his right against the Government.

The case in *Kunhunni Menon* v. *Sankaran Valia Raja Avergal* (1) is distinguishable from the facts of the present case. In that case there was no eviction by the owner having paramount title. If a tenant attorns to a third person, though he has true title, that would not protect him against a suit of the landlord in ejectment. It is unnecessary to discuss the cases cited by Mr. Seshagiri Sastri for the respondent, such as *Hill* v. *Saunders* (2), *Matthey* v. *Curling* (3) and *Doe* v. *Barton* (4). In *Ram* v. *Pramatha* (5) it was held that it was open to the tenant to prove a subsequent cesser of landlord's title by ouster by the holder of a title paramount and to attorn to the latter without actually going out of possession. The eviction by the true owner or the owner of the paramount title puts an end to the tenancy and if the tenant attorns to the true owner, he does not do so as a tenant of the landlord who let him into possession but accepts a new tenancy from the true owner. It does not matter in cases of this kind that the true owner is the Government. A tenant is not entitled to set up the title of the third person even though the title is that of the Government. But he is entitled to plead that he was evicted by the true owner, whether the true owner be the Government or a private person and that after such eviction he attorned to the true owner. In such a case, the landlord who let him

1. (1917) 7 L W 574.
2. 107 E R 1157.
3. (1922) 2 A C 180 at 232.
4. 113 E R 432.
5. (1921) 35 C L J 146.

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into possession cannot rely upon the law of estoppel as contained in S. 116 of the Indian Evidence Act as preventing his former tenant from pleading a *jus tertii* in a third person. The defendants in this case were evicted by the Government from the plaint land before the date of the suit and the acceptance of patta by them was after the eviction and therefore the plaintiff cannot succeed against the defendants unless he is able to make out a title against the Government. The Secretary of State is not a party to the suit and there is no finding that the plaintiff has a better title than the Government, whereas the evidence seems to point the other way.

In the result the Letters Patent Appeal is dismissed with costs.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

Kasturi Narasimha Suryanarayana *alias* Appa Rao ... *Appellant** (*6th defendant*)

v.

Achuthana Lakshminarasimham and others ... *Respondents* (*Plaintiffs* 1 *to* 5 *and defendants* 1 *to* 5 *and* 7).

Narasimha Suryanarayana v. Lakshminarasimham.

Civil Procedure Code, S. 92—Interest—What is—Residence in the neighbourhood—Marriages celebrated in the temple—Occasional worship—If sufficient—Prior suit by trustee to recover possession of lands from archakas*—Decision against trustee—If* res judicata *in suit by relators.*

In a suit under S. 92, Civil Procedure Code, the question whether the plaintiffs have an interest in the trust or not is a pure question of fact. Where the plaintiffs live within 2 or 3 miles of the suit temple and the temple owns lands at their place of residence, and the evidence shows that persons belonging to their village attend the temple on important occasions and perform their marriages there, they are persons "interested" within the meaning of S. 92. The mere circumstance that the plaintiffs do not habitually resort to the temple is not sufficient to debar them from exercising the right under the section. *T. R. Ramachandra Aiyar* v. *Parameswaran Unni,* I L R 42 Mad 360; *Vaidyanatha Aiyar* v. *Swaminatha Aiyar,* I L R 47 Mad 884 (P C) referred to.

Where in a prior suit by the trustee of a temple to recover possession of certain lands from the *archakas,* a decision is given after a real and genuine contest that the lands do not belong to the temple but to the *archakas,* it is *res judicata* in a subsequent suit filed by relators under S. 92, Civil Procedure Code, for recovering possession of the same from the same *archakas.*

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*Appeal Nos. 258 and 333 of 1922. 26th August, 1925.

Narasimha Surya-narayana v. Lakshmi-narasimham.

Appeals against the decree of the Court of the Additional Subordinate Judge of Guntur, dated 30th January, 1922 in O. S. No. 37 of 1921.

G. Lakshmanna and *K. Kameswara Rao* for appellant.

P. R. Ganapathi Aiyar, V. Krishna Mohan, G. Krishna Arya and *Viraraghavalu* for respondents.

The Court delivered the following

Venkata-subba Rao, J.

JUDGMENTS :—*Venkatasubba Rao, J.* :—This is a suit instituted under S. 92 of the Civil Procedure Code. It relates to the temple dedicated to Chennakeswaraswami at Cherukupalli, Repalle Taluq. There are five plaintiffs and the plaint asks for reliefs contemplated by S. 92, Civil Procedure Code. The learned Subordinate Judge has passed a decree and the present appeals have been filed by the defendants in the suit.

The appellants in Appeal No. 333 of 1922 firstly contend that the plaintiffs are not persons having an interest in the trust within the meaning of S. 92 and the suit, therefore, does not lie. The Lower Court has rejected this plea and, in my opinion, rightly. The 1st plaintiff is a resident of Arumbaka, and Cherukupalli, where the temple is situated, is a hamlet of this place. The 1st plaintiff's marriage was performed at the temple in question. He is the Karnam of Cherukupalli. The 2nd plaintiff resides at Balusulapaliem which is at a distance of two miles from Cherukupalli. The 3rd, 4th and 5th plaintiffs reside at Sirupudi which is within three miles from the suit temple. At both these places the temple owns lands. According to the evidence, persons belonging to these villages attend the suit temple on important occasions and they also celebrate at that temple their marriages.

Can it be said that in these circumstances the plaintiffs are not persons having an interest in the trust ? The case that has been most strongly relied on by the appellants is *T. R. Ramachandra Aiyar* v. *Parameswaran Unni* (1) ; but, in my opinion, this case does not support them. Whether the plaintiffs have an interest in the trust or not is a pure question of fact and the case cited must be understood with reference to the facts of that case. All that it decided is, that although *prima facie* any Hindu has a right to worship in any Hindu temple it does not necessarily follow that every Hindu has in relation to every Hindu temple the interest which gives

1. (1918) I L R 42 M 360 : 36 M L J 396.

Narasimha Surya-narayana v. Lakshmi-narasimham. — Venkata-subba Rao, J.

him the right to sue under S. 92. The danger of the extreme view contended for in that case is very well pointed out by Sir John Wallis, C. J., for according to that view any Hindu out of the millions of Hindus in India may institute a suit in respect of any temple. Coutts Trotter, J. (as he then was) also refers to the absurdity of this position by pointing out that a Hindu resident of Peshawar cannot be said to have an interest within the meaning of S. 92 in a temple in Malabar. While avoiding this extreme view, one must not commit the mistake of going to the other extreme. The view now urged by the appellants is that unless a person habitually resorts to a temple for worship he cannot be said to have an interest under the section. As pointed out in one of the judgments in that very case, the Christian conception of a parish with special local rights in its parishioners is utterly foreign to the Hindu mind. This fact must not be lost sight of when dealing with Hindu institutions and there is nothing in S. 92 to compel the Courts to adopt the very limited and narrow construction suggested by the appellants. A Hindu will feel surprised to be told that he has no interest in a temple which is within a few yards of his residence because he does not habitually attend at that temple for purposes of worship. To worship the God in the temple it may not be always necessary to resort to the temple. Can it be said that a man who lives in the vicinity of a temple and regularly comes out to worship the idol when it is taken in a procession is not a person having an interest in that temple ? The Civil Procedure Code of 1877 (S. 539) provided that the persons authorised to sue must have a " direct interest " in the trust. The word " direct " is omitted in the present Code and the very object of this change will be defeated if the narrow construction suggested is adopted. The interest which the plaintiffs possess must be real and not remote, must be substantial and not illusory, must be an existing interest and not a mere contingency. The most authoritative statement of the law is that contained in *Vaidyanatha Aiyar* v. *Swaminatha Aiyar* (2). Their Lordships of the Judicial Committee say : " That the bare possibility, however remote, that a Hindu might desire to resort to a particular temple does not give him an interest under S. 92 in the trust. " This is the limitation we must recognise but it is not a proper inference from this, that whatever may be the proved facts, the mere circumstance that the plaintiffs do not habitually resort to a

2. (1924) I L R 47 M 884 : 47 M L J 361 (P C).

Narasimha Surya-narayana v. Lakshmi-narasimham. — Venkata-subba Rao, J.

temple is sufficient to debar them from exercising the right under the section.

The next point raised in the appeal relates to the question of *res judicata*. Defendants 1 to 5 are hereditary *archakas* and they claim with reference to a large extent of the property, the subject-matter of the suit, that it was in the remote past set apart as a special endowment for (1) *archaka* service and (2) *Nitya Dhupa Dheepa Naivedyam*. According to their case, their ancestors who were *archakas* were put into possession of these lands and they were to perform the *archaka* services and provide the articles of worship. In other words, it was a unified or a combined endowment and from the income of the property moneys were to be spent not only for the purchase of the materials but also for remunerating their own services, *i. e.*, the services of the *archakas*. Has this question become *res judicata* by reason of the judgment of the High Court (in Appeal No. 283 of 1914) in the previous Suit No. 77 of 1910? The present 6th defendant, the hereditary trustee, was the plaintiff, and the present defendants 1 to 5, the *archakas*, were the contesting defendants in that suit. The hereditary trustee claimed in it possession of these properties and the *archakas* resisted that claim. They put forward in that suit the same defence as they have now put forward in this. In paragraph 3 in the written statement in C. S. No. 77 of 1910 the *archakas* claimed that the lands in question "were originally endowed specifically for *archaka* service which consists of daily worship, *naivedyam* and lighting." A portion of the second issue in that case runs thus :—

"Were the lands originally granted for *archaka* service and are the defendants entitled to hold them without the interference of the Dharmakartha, if any?"

The case was disposed of finally by the learned Judges of this Court and the contention of the defendants was accepted by them. We have carefully read the judgment and we cannot help coming to this conclusion. After referring to the contention raised in para. 3 of the written statement the learned Judges said :—

"The origin of these endowments is not known but the evidence is that these lands have been in the possession always from time immemorial of the *archakas* and that they have applied the profits for the services mentioned in the written statement."

They decided that the trustee was not entitled to possession of these lands and made the following observation :—

"The long possession of the defendants raises a strong presumption in their favour that their possession had a legal origin."

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Venkatasubba Rao, J.

Not only did the learned Judges find that the defendants were entitled as against the trustee to remain in possession but they also found that their possession had a legal origin. What can this legal origin be referred to ? The *archakas* claimed that the lands had been put in their possession for certain specific purposes mentioned. That claim the High Court recognised in the earlier part of the judgment and the finding in favour of a legal origin can only refer to the recognition of the same claim as then put forward.

The respondents' learned Vakil has laid stress upon the following portion of the judgment :—

"As regards the possession of these lands we are of opinion that the plaintiff has made out no cause of action."

What the learned Judges meant to say was, that in a suit framed as one for possession, the plaintiff could get no relief on their findings. Nothing more could have been meant. They merely intended to say that although the contention of the *archakas* was well founded, nevertheless if breach of trust or mismanagement could be shown on their part, the plaintiff could obtain relief in appropriate proceedings. This does not mean that they decided only the question of possession. I am therefore clearly of the opinion that the *archakas* put forward their right in the previous suit, that it formed the subject of an issue and that in the final judgment in the case the High Court upheld that right. Are then the plaintiffs not bound by that adjudication ? When in a suit where the trust is properly represented, after real and genuine contest a decision is given, it will be absurd to hold that persons not parties to the previous suit, although they may have an interest in the trust, can ask the matter to be re-opened and the question to be re-tried. I am satisfied that the plea of *res judicata* must prevail.

The learned Subordinate Judge has disallowed the claim of these defendants to about 23 acres out of 130 acres claimed by them. He has found that this land had been endowed for the lighting of the *akhandam*. This finding has not been questioned in the appeal and we confirm it.

The result is that after excluding the lands set apart for the *akhandam* the rest of the land out of 130 acres will be declared as having been set apart for the *archaka* services and for *Nitya Dhupa Dheepa Naivedyam.*

In the case of this endowment there arises a conflict between interest and duty. The position of the *archakas* offers to them the temptation of spending as little as possible on *Nitya Dhupa Deepa Naivedyam*, for whatever is not spent in that way may be retained by themselves as remuneration for their own services. We therefore think it necessary that we should fix the proportion. 3|7ths of the net produce we desire to set apart for purposes connected with *Nitya Dhupa Dheepa Naivedyam* and the *archakas* will be at liberty to retain the balance, that is 4|7ths as remuneration for the *archaka* services.

Lastly remains the question (raised in App. 258 of 1922) is it necessary to remove the hereditary trustee ? In our opinion it is neither necessary nor desirable. The temple is in a petty village and it is not likely that the services of an efficient trustee will be available. Most of the charges against the trustee show that he has been guilty of neglect, but it must be said that he has not wasted or alienated the corpus and has for a long time been fighting with the *archakas* with a view to get for the temple the properties in their possession. This temple though well endowed is apparently not an important one and the neglect of the trustee has aroused little public attention. It seems to us that the present suit was directed more against the *archakas* than against the trustees. The decision in the previous suit having been against the trustee, this was a fresh attempt made in the same direction to get the lands claimed as a special endowment declared to belong to the general endowment of the temple. We do not think that, in the interests of the temple, the 6th defendant should be removed from the office of trustee. We declare that the office is hereditary in his family and we direct that he shall continue as trustee.

The *archakas* will be directed to deliver up possession to the 6th defendant of all lands which have not been declared to be the subject of the special endowment referred to above. The *archakas* will be entitled to retain with themselves 4|7ths of the net produce of the lands forming the special endowment and to hand over to the 6th defendant the remaining 3|7ths.

We understand that the interim trustee appointed by the Court has certain moneys with him either in his hands or in deposit in Court. These sums he will be directed to pay into the hands of the 6th defendant who shall deal with them in accordance with the rights declared in their judgment.

In the scheme to be framed, it will not be necessary to insert any provision regarding the repairing or the rebuilding

Narasimha Suryanarayana v. Lakshminarasimham.

Venkatasubba Rao, J.

of the temple. These are matters which, no doubt, the trustee will attend to at an early date in the discharge of his duties.

Each party will bear his costs in these appeals. So far as the costs of the suit in the Lower Court are concerned, the plaintiffs will get 2|3rd of their costs from the 6th defendant from and out of the temple funds; the balance of 1|3rd they shall get from defendants 1 to 5 and 7 personally.

The parties are required to bring in a scheme to-morrow.

A copy of this judgment and the scheme will be forwarded to the Religious Endowments Board.

Madhavan Nair, J.

Madhavan Nair, J. :—I agree with the judgment just now delivered by my learned brother. As regards the meaning of the term "interest" as used in S. 92, Civil Procedure Code, I have already expressed my opinion in my judgment in A. S. No. 88 of 1922 and for that reason I do not think it necessary to further deal with it here. On the facts of this case, I am clearly satisfied that the plaintiffs have the interest contemplated by S. 92, Civil Procedure Code.

The following scheme has been submitted to us and we approve of it :—

1. The office of trustee shall be hereditary in the family of the 6th defendant. He shall be the first trustee under this scheme and shall hold office for life.

2. The trustee shall ordinarily reside in Repalle Taluq, Guntur District.

3. The trustee shall utilise the 3|7ths of the income to be paid by the *archakas* which has been referred to in the judgment for the *Nitya Dhupa Deepa Naivedyam*.

4. The *archakas* shall be permitted to live in the house and site described in Sch. A belonging to the temple.

5. Save as is expressly provided herein, the provisions of the Religious Endowments Act (Madras Act I of 1925) shall apply to the hereditary trustee and all matters connected with him or the management of the trust.

T. S. V. *Scheme settled.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Subramanian Chetty ... *Petitioner** (*Petitioner*)

v.

Ramaswami Chetty and others ... *Respondents* (*Counter-petitioners*).

Subramanian Chetty *v.* Ramaswami Chetty.

Civil Procedure Code, S. 73—Rateable distribution—Right to—Conditions—Execution application praying for a relief which the Court could not grant—If a ground for rejecting that decree-holder's application under S. 73—Order under S. 73—Interference in revision with.

Only two conditions must be fulfilled to entitle a person to rateable distribution under S. 73, Civil Procedure Code. He must have a money decree against the same person of which satisfaction has not been obtained ; and he must have applied for execution of that decree before the assets were realised. It is not necessary to entitle him to join in the rateable distribution, that his execution application should be such as would have ended in his successfully obtaining satisfaction of his decree. *Held*, therefore, that the execution application of a decree-holder was for the arrest of a person who could not have been arrested, because he was outside the jurisdiction, was quite immaterial so far as S. 73 was concerned.

Where there is a manifest error in an order made under S. 73, Civil Procedure Code, the High Court will, in revision, interfere to put that error correct.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Devakotta, dated the 27th day of October, 1922, in E. A. No. 439 of 1922 in E. P. No. 66 of 1922 in O. S. No 582 of 1921.

M. Patanjali Sastri for petitioner.

B. Sitarama Rao, S. R. Muthuswami Aiyar and *P. V. Krishnaswami Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—This is an application to revise an order passed under S. 73 of the Civil Procedure Code by the District Munsif of Devakotta. The petitioner before me was one of the decree-holders against a common judgment-debtor whose assets had been realised within the meaning of S. 73 of the Civil Procedure Code and were held by the Court. S. 73 says :—

"Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons."

*C R P No. 226 of 1923. 1st May, 1925.

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Now, the petitioner before me put in an application for execution of his decree which was a decree for payment of money passed against the same judgment-debtor, to arrest him, and this application had been admittedly made before the receipt of the assets with which we are concerned in this case. His application to be paid rateably from the assets had, however, been rejected on the ground that, when he applied for the arrest of the judgment-debtor, that man was not living within the jurisdiction of the Munsif's Court but was living in Penang, where the District Munsif of course had no jurisdiction and could not therefore have ordered his arrest. This finding of fact has been arrived at mainly on the ground that, in another petition for execution by the same decree-holder, he has stated that the man was living at Penang; but he has explained it by saying that that statement was wrongly put in by the vakil's clerk who drafted that application. It is therefore doubtful whether the judgment-debtor was on the date on which the application was made in Penang. Assuming, however, that the judgment-debtor was at Penang at the time of the decree-holder's application for arrest, the question is "Does that prevent him from obtaining the advantage of rateable distribution ?" The section is intended to distribute equitably the assets of the common-debtor realised by the Court among the decree-holders and the one condition that is laid down to make sure of the fact that those creditors have been diligent is that the creditors must have previously applied for execution of their decrees, this condition excluding creditors who have taken no steps to realise their debts; but there is no condition that the execution application put in by the party should be such as would have ended in his successfully obtaining satisfaction of his decree. The only two conditions laid down are that he must have a money decree against the same person and that he must have applied for execution of that decree before the assets were realised. If these two conditions are fulfilled, he is entitled to join in the rateable distribution. In the present case I see no reason to exclude the decree-holder on the finding of the District Munsif. The fact that his application was for the arrest of a person who could not have been arrested is quite immaterial so far as section 73 is concerned. It is even possible to imagine that, though the judgment-debtor was not, on the date when the execution application was put in, living within the jurisdiction of the District Munsif, he might have come there before the order is passed by the District Munsif for his arrest, and there is nothing to

prevent the District Munsif passing the order, if, by the time he passes his order, the judgment-debtor is within his jurisdiction, although at the time the application was made, he was not within his jurisdiction. But these questions are outside the scope of S. 73. All that the Court has to be satisfied about is that there is a money decree of which satisfaction has not been obtained against a judgment-debtor and that the decree-creditor has shown his diligence by applying for execution of that decree before the assets were realised. On these conditions being fulfilled the decree-creditor is entitled to join in the rateable distribution. No case exactly in point has been brought to my notice, but some cases have been cited with reference to Art. 182 of the Limitation Act which speaks of applications for execution made in accordance with law. Even according to those cases which construe those words "applications in accordance with law," an application like the present one would be fully in conformity with the requirements of the law; though it prayed for a relief which perhaps the Court would not have granted, it is still treated as an application in accordance with law for the purpose of Art. 182 of the Limitation Act—see *Bando Krishna* v. *Narasimha* (1). I hold therefore that the petitioner before me was entitled to join in the rateable distribution.

It has been urged before me by the learned vakil for the respondent that, as under S. 73 of the Civil Procedure Code, there is a special remedy provided, namely, that of a suit, I should not interfere in revision at all. No doubt, in some instances, Courts have held that it will be convenient to make the parties adopt that remedy, but that provision does not prevent a Court from interfering under S. 115 where there is a manifest error in the order under S. 73, and putting that error correct, as otherwise the parties will be driven to unnecessary litigation. I think this is a case in which a manifest error has been made by the District Munsif and I feel therefore justified in interfering with the order of the Lower Court and I modify that order by directing the District Munsif to make a fresh order under S. 73 giving rateable distribution to the petitioner before me for both of his decrees. The case will be remitted to the District Munsif for the purpose of passing fresh orders. Each party will bear their own costs of this petition.

A. S. V. *Case remanded.*

1. (1912) I L R 37 B 42.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Neelam Venkataratnamma ... *Appellant** (*Plaintiff*)

v.

Venjamoori Varaha Narasimhacharyulu ...*Respondent* (*Defendant*)

Venkataratnamma *v.* Narasimhacharyulu.

Registration Act, Ss. 49, 17—Gift deed which must be, but is not, registered—Admissibility in evidence—Purposes for which it can be admitted in evidence.

A gift deed, which must be, but is not, registered, can be received in evidence, not to prove any definite gift, but to prove, for what it is worth, that there was talk of making some assignment at that date. The Court cannot receive the document in evidence to prove a gift and then infer that the possession of the person in whose favour it was executed was adverse, and justify its acceptance of the document on the ground that it confined itself to the inference, and was not concerned with the fact of the gift.

Second Appeal against the decree of the Court of the Subordinate Judge of Cocanada in A. S. No. 84 of 1921 preferred against the decree of the Court of the Principal District Munsif of Cocanada in O. S. No. 32 of 1920.

P. Satyanarayana Rao for appellant.

V. Govindarajachari for respondent.

The Court delivered the following

JUDGMENT :—Appeal from the decree in A. S. No. 84 of 1921 on the file of the Court of the Subordinate Judge of Cocanada, O. S. No. 32 of 1920 on the file of the Court of the Principal District Munsif of Cocanada.

Plaintiff sues for certain portions of a house site. Both Courts dismissed his suit and plaintiff appeals.

Issue 2, whether plaintiff was in possession within twelve years prior to suit, is a question of fact on which both Courts find against plaintiff ; and he only seeks to traverse that finding in this second appeal by urging that the learned Subordinate Judge erred in accepting as evidence the unregistered gift deed, Ex. V. There is no doubt that Ex. V is a transaction affecting an interest in immoveable property and as such cannot be received in evidence unless it is registered. The Subordinate Judge, however, relying upon *Varada Pillai v. Jeevarathnammal* (1) has admitted the document for the purpose of proving that possession was adverse. In the reported case it was sought to prove a gift for which there was no

*S A No. 256 of 1923. 3rd August, 1925.

1. (1919) I L R 43 M 244 : 38 M L J 313 (P C).

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registered deed by its recital in a petition which also had not been registered. The Judicial Committee decided that the petition could not serve as proof of the gift, but, turning to another question, what was the nature of Doraiswami's possession, the petition could be admitted in evidence. Thus the petition was not evidence of a gift, but evidence that some one had petitioned on the footing of a gift. Care must be taken not to extend this principle too far. For instance, in the present case, the Court cannot receive Ex. V in evidence to prove a gift and then infer that the defendant's possession was adverse and justify its acceptance of Ex. V on the ground that it confines itself to the inference, and is not concerned with the fact of the gift. Because the inference is only based upon the fact, and if the fact cannot be proved by the unregistered instrument, nothing can be proved on which to found an inference.

But the document can go in, not to prove any definite gift, but to prove, for what it is worth, that there was talk of making some assignment at that date. That, at least, is how I interpret the ruling in *Varada Pillai* v. *Jeevarathnammal* (1). In C. R. P. No. 710 of 1923 I had occasion to examine this very question with the aid of the ruling in *Saraswathamma* v. *Paddayya* (2), and I observed : "In my opinion, if the document is filed on the strict understanding that it must not evidence any transaction affecting immoveable property its scope in the majority of cases will be very small. At most I think it will evidence, as observed by Venkatasubba Rao, J., an intention." In the present case I doubt if Ex. V could evidence more than that the house-site was too small to admit of a backyard and the vendor was corresponding about it. But even on that assumption, and supposing that he read the whole document, I do not consider that the finding of the learned Subordinate Judge is vitiated. There is direct oral evidence of defendant's adverse possession, and the District Munsif found in his favour, even after rejecting Ex. V as inadmissible. There is no dispute about the exact areas occupied, and Ex. V is really only useful in corroborating the oral evidence by showing that at the date when it was written there was trouble about the insufficiency of the site. When it comes to considering the actual measurements in Ex. V they are of more help to the appellant than to the defendant because there are certain discrepancies between the original area in the docu

1. (1919) I L R 43 M 244 : 38 M L J 313 (P C).
2. (1922) I L R 46 M 349 : 44 M L J 45.

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ment and that now occupied. *Vide* para. 6 of the Lower Appellate Court's judgment.

So it cannot be argued that the appellant was prejudiced by their consideration; and all that really operated upon the mind of the learned Subordinate Judge, in my opinion, was the part of Ex. V which can legitimately be regarded as evidence.

Accordingly I see no reason to remand the suit for fresh findings.

No other ground of appeal was raised or appears to be valid.

The appeal is dismissed with costs.

A. S. V. *Appeal dismissed.*

PRIVY COUNCIL

[On Appeal from the Court of the Judicial Commissioner of Oudh.]

PRESENT :—LORD SUMNER, LORD BLANESBURGH, SIR JOHN EDGE, MR. AMEER ALI AND LORD SALVESEN.

Musammat Farid-un-nisa ... *Appellant**

v.

Munshi Mukhtar Ahmad and another ... *Respondents.*

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Purdanashin lady—Deed executed by—Her knowledge of its contents—Sufficiency of explanation prior to her execution.

Where a deed purporting to be executed by a *purdanashin* lady is in dispute, the onus on those who seek to set it up is to establish that she was fully aware of its contents and purport either prior to its execution, or after it, under such circumstances as show it to be her own mental act and deed, or her adoption and ratification of it with full knowledge and comprehension. And if the deed, as presented to her for execution, differs materially, by addition or omission, from the scheme and details which she had previously laid down, the discrepancy ought to be clearly pointed out to her, and its nature and effect fully described.

Tacoordeen Tewarry v. *Ali Hossein Khan*, L R (1874) 1 I A 192; *Wajid Khan* v. *Ewaz Ali Khan*, L R (1891) 18 I A 144; *Sunitabala Debi* v. *D. Sundara Debi*, L R (1919) 46 I A 272; *Kali Baksh Singh* v. *Ram Gopal Singh*, L R (1913) 41 I A 23; *Sudisht Lal* v. *Sheobarat Koer*, L R (1881) 8 I A 39; *Sham Koer* v. *Dah Koer*, L R (1902) 29 I A 132; and *Sajjad Hussain* v. *Wazir Ali Khan*, L R (1912) 39 I A 156 referred to.

Appeal from a decree of the Court of the Judicial Commissioner (Kanhaiya Lal and Daniels, JJ.), dated the 14th January, 1921, which reversed a decree of the Subordinate Judge of Bara Banki (S. Asghar Hassan, Esq.) dated the 30th April, 1918, which dismissed the appellant's suit with costs.

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*P C Appeal No. 118 of 1923. 6th July, 1925.

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The material facts appear from the judgment of their Lordships.

S. Hyam for appellant.

W. Wallach for respondents.

6th July, 1925. The Judgment of the Board was delivered by

Lord Sumner.

LORD SUMNER :—The plaintiff-appellant, having sued o recover possession of a residence and agricultural land at or near Ahmedpur, the Subordinate Judge of Bara Banki passed a decree in her favour against two of the defendants, who are now respondents to this appeal. In the Court of the Judicial Commissioner of Oudh this decree was set aside and the suit was dismissed. The plaintiff had executed a *wakfnama*, covering the property and appointing the respondents *mutawallis* of the *wakf*, and accordingly the claim is in substance to set the deed aside.

At the time of the execution the plaintiff was a married woman, illiterate, childless and *purdanashin*. She and her husband, Sheikh Karim-ud-din, were Muhammadans. Most of the property in question had been given to her upon her marriage by her maternal grandfather, but the residence, known as the mahal, and some *sir* land, both in the village of Ahmedpur, came to her by inheritance. Since her marriage she had lived there continuously, and, although during the earlier part of their married life her husband was generally absent on Government service, he had retired, and for some years had resided entirely at Ahmedpur. He suffered from incurable disease, had become nearly blind, and was otherwise crippled and incapable, but his mind was not in any way affected.

The defendants, the *mutawallis*, who were in possession, relied upon the *wakfnama* as their title. Its gist was to divest the plaintiff of the whole of her property, which became vested in them, but it reserved to her a life stipend of Rs. 34 per mensem, and another of Rs. 33 per mensem to her husband, and also gave her the right to continue to reside in "The Mahal" for life, the *mutawallis* being bound to keep it in repair, as well as to pay the stipends. They were two brothers, sons of a sister of the plaintiff's husband, to whom he was much attached. Their Lordships do not think it is sufficiently made out that they or either of them had acted as men of business for the appellant, and they put this point aside,

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but she was on friendly terms with them. It is said that she was at enmity with her own relations, for reasons that do not appear to reflect on her. At any rate, she virtually lived apart from and saw little of them, nor had she, in fact, any support or advice from their side.

Very shortly after the marriage the management of the property was assumed by the plaintiff's husband, her father, who had previously managed it, being now dead, and he continued to manage it as long as he lived. He employed the necessary *karindas* and others for the purpose, and directed the disposition of the rents and profits. Over and above his salary he was himself a man of little or no means. His wife never took part in the management, nor was she shown to have had any business knowledge or experience. From time to time, under the direction of her husband, she executed *muktarnamas* and other documents for estate purposes, but she relied on him entirely as to their necessity and purport. Sums for her personal and household purposes were paid to her with fair regularity, and they seem to have been, though modest, probably sufficient ; but she did not direct the whole even of the household expenditure, and her own outlays were on various occasions criticised by her husband and even censured as improvident. There is this to be said for him, that the estate was encumbered and, when he took up the management, much embarrassed, but in time he considerably improved its position. The *wakfnama* enumerates sundry charges outstanding upon it, amounting in all to about Rs. 12,800, with an annual interest of Rs. 730, for the service and discharge of which the *mutawallis* were to provide, and the total value of the property, when settled by the deed, was from Rs. 40,000 to Rs. 50,000, and the income about Rs. 2,500.

The respondents recognised that the burden of proof was on them [*Tacoordeen Tewarry's case* (1)] and they accordingly set about to prove her intelligent execution of the deed, its contents having been read and explained to her both upon and after execution. It was not, however, contended that she had had any legal advice about it or any consultation with her own relations. She, on the other hand, raised two answers, the first, that she executed it under actual undue influence of her husband, which dominated her choice and will, and the second, that, when she executed it, she had had no explanation of its nature and contents, but throughout believed it to be

1. L R (1874) 1 I A 192 at 206.

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an instrument needed for the routine management of the estate, such as she had constantly executed before. A contention, that she had never executed it and that the thumb-mark which it bears is not hers, has not been persisted in.

The probabilities are not unequally balanced. She was a conforming and sincere Mohammedan, though not shown to have been of any exceptional piety. Her husband was a leper, and, even if he lived, as she says she was sure that he would, his management of the estate, at any rate, was nearing its end. The estate was no easy matter to deal with, and the assurance of an income, similar to that which she had hitherto enjoyed, and the continued use of her old home for life, might seem to be a desirable arrangement. She had nothing against the young men who were named as *mutawallis*. They were well known to her, and, as to her own people, it is not pretended that she felt either duty or inclination towards them. A gift of her property to God, with a modest provision for herself and her husband during life, was no bad thing, even though she herself was only about thirty years of age.

On the other hand, her husband had been manager of his wife's property so long that he might quite probably regard it as his own, and certainly he so treated it. He, at least, could not have failed to foresee his death at no distant date, as actually befell within the year. He had no great opinion of his wife's prudence or moderation, and the idea that her property might pass away from him and his must have been repulsive to him. Security for his own last days and a provision for his widow, coupled with some acquisition of merit by the performance of a pious act, must have made the idea of a *wakf* attractive to him. Though burdened with religious obligations, the property would, at any rate, be kept in his family.

There is a third probability. It is that the appellant may have been fully acquainted with the scope of the deed, have fully concurred in the creation of the *wakf* for which it provided, and have executed the *wakfnama* freely and with understanding, but have changed her mind, for, after a few months of widowhood and pilgrimage, she married again.

After the fullest examination of the evidence, voluminous even for a case of this kind, their Lordships are of opinion that the *wakfnama* was not executed under actual undue influence of the husband, and that, both before its execution and also shortly after its execution, when it came to be registered, its contents were read over to the appellant and were to some

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extent explained to her. In what terms that explanation was given the evidence does not show, and its sufficiency becomes the real issue on this appeal.

As for the case of actual undue influence, the husband was not present when the deed was registered, and there is nothing but mere suggestion, derived from the character of the transaction and his marital relation to her, to show that, when it was executed, his will operated on hers at all In her evidence she declared with spirit that, had she known what the real import of the deed was, she would have refused entreaties and defied threats, and would never have given the smallest portion of her property to him or his relations. There is a ring of truth about this, which must prevail over the ingenious suggestion that, in the circumstances of the case, she must be deemed, all unknown to herself, to have been chronically under the hypnotic suggestion or control of her husband, while believing and even glorying in her fancied independence.

Again, their Lordships are not prepared to reject the evidence that the *wakfnama* was explained to the lady before it was executed. It was open to much criticism, and the learned Subordinate Judge refused to believe it, but the evidence had been recorded by his predecessor and he had not seen the witnesses. Their Lordships agree with the learned Judges of the Judicial Commissioner's Court that there is no sufficient ground for its rejection. Taking it, however, as it stands, the question remains whether it goes far enough to satisfy the burthen of proof which rests on the respondents.

The deed was registered on the 3rd November, 1914. A month or six weeks previously the appellant's husband, Karim-ud-din, being then unable to write or read, sent for his nephew, a young man named Jamal-ud-din, and dictated to him a *wakfnama* word by word. This took five or six hours. The appellant was not present, and Karim-ud-din sent the young man into the house to ask her what salaries she wished to have inserted in the deed. To this she replied by asking whether Karim-ud-din was getting him to write the draft. All this, which is deposed to by Jamal-ud-din, a witness called by the respondents, seems to point to some previous communication on the subject between the husband and the wife, but what it was is not known.

During the previous three years the plaintiff had spoken on several occasions of creating some *wakf,* but full details of

her scheme were never given, and once at least she was dissuaded from doing anything at all. Such details as are given show that her ideas then differed substantially from the scheme of the *wakfnama* which was ultimately executed. When Jamal-ud-din told her that a draft was being prepared she proceeded to say (*i*) that the salaries for herself and her husband were to be within Rs. 100 per mensem ; (*ii*) that certain other things were to be provided for in the deed, namely, that the *rajabi* and *maulud,* which she had celebrated, were to continue to be celebrated as before, that at Moharram *majlis* and *sabils* were to be continued, that other ritual acts should also be performed, and that a *musjid* at Ahmedabad, which her mother's father had built and she herself had always caused to be cleaned and repaired, should be cleaned and repaired as before ; (*iii*) that a plot of land, which she had given to a certain Kabir-ud-din for a house should not be included in the *wakfnama* at all. All this Jamal-ud-din says that he reported to Karim-ud-din, who agreed to the provisions required. He was then sent back to the appellant to ask whether some provision should be made for payment to the *mutawalli,* to which she replied that one-third of the Rs. 100 provided for her husband and herself should be paid to him as his pension. Jamal-ud-din then completed his task and, as far as he remembers, the draft then provided for all the matters which the appellant had required. He placed it in her custody, and to her question replied that all her requirements had been provided for. He did not see the plaintiff again till after the registration of the *wakfnama,* nor did he see the draft again either. In fact, it was never put in evidence, nor did any witness prove that the draft, as it left the hand of Jamal-ud-din, was ever compared with the fair copy which the plaintiff ultimately executed. The evidence is merely that one, Mustafa Husain, a brother-in-law of the defendants, engaged a person named Wazir-ud-din to make a fair copy of this draft, because he could write a good hand, and, on getting the draft from the plaintiff, read it over and he says, apparently from memory two years afterwards, that this draft and the draft ultimately executed were the same, except for the mention of a debt to Wazir-ud-din of Rs. 400 for procuring the necessary stamped paper, a matter only arranged after Jamal-ud-din's draft was prepared.

All this is absolutely denied by the plaintiff, but, as the whole of her evidence cannot be true, and as the evidence

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given by Jamal-ud-din and Mustafa Husain is confirmed by other witnesses, their Lordships accept this story generally.

The form of the deed itself thereupon becomes of some importance. It is lucidly and logically drafted, with much more of a lawyer's phraseology and orderly arrangement and much less of a layman's irrelevance and colloquialism, than such deeds in India often contain. It differs, however, from the account given by Jamal-ud-din in several particulars, and no one suggests that, between the time when he gave her his draft and the time when Wazir-ud-din read over his fair copy to her before she executed it, she was ever told of any departure from the terms, in which her wishes had originally been expressed.

The following differences are material. Clause 2 states that the plaintiff appoints the first defendant, "whom I have brought up and treated as my son," to the office of *mutawalli*, and continues "from to-day I have put Mukhtar Ahmad and Iftikhar Ahmad in possession of the said property as *mutawallis*". As a matter of fact, this admittedly was an afterthought. Mukhtar Ahmad, the first defendant, on hearing of the *wakf* (though not from the plaintiff) said that, as he was busy, he wished his younger brother Iftikhar to be joined as a *mutawalli*. Accordingly this was done, and as, by a subsequent clause, No. 12, each *mutawalli* was to have Rs. 33 per mensem, the sum of Rs. 100, which the plaintiff had fixed to cover the stipends of herself, her husband, and the one *mutawalli*, whom alone she had in view, now became an aggregate of monthly stipends of Rs. 133.

Clause 20 specified how "the *mutawalli*" was to expend the surplus income, after payment of Government revenue, the expenses mentioned, and all other necessary expenses as to the management. He was to do so "after taking into consideration the then existing circumstances of the *wakf* property and as to what sum is reasonable to spend, when and on one or more of the following purposes"—twelve in number. These purposes, except "repairs of the mosque in Ahmedpur," are expressed in general terms. The last sweeps in "other expenses on pious objects, which may come up". Subsequent provisions give further powers "beside these expenses.....to spend money or [Query "on"] anything without the permission of the authority for the time being having power to interfere with the affairs of the *wakf*," and "if any of the objects mentioned in cl. 20 is void in law the *mutawalli* shall spend

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the money on any other legal object" (cl. 21). Among the twelve objects particularly named there occur quite generally some of the pious purposes named by the appellant to Jamal-ud-din, though one is omitted. In no case is there mention of the continuance of those ceremonies, which the appellant herself had performed. The objects supported by the *mutawalli* under these denominations might in his discretion be wholly divorced from those which the plaintiff had prescribed, and might be entirely unconnected with her or her place of residence in Ahmedpur. The question at once arises, "Was the appellant ever really made aware of these discrepancies, and did she assent to them ?"

As a formally valid instrument the *wakfnama* itself is not impugned, and their Lordships therefore do not criticise it. The real question is, whether the appellant was so made cognizant of its contents and purport that it can be said that the respondents have discharged the onus of showing that she understood it so as to make it her deed.

The law of India contains well-known principles for the protection of persons, who transfer their property to their own disadvantage, when they have not the usual means of fully understanding the nature and effect of what they are doing. In this it has only given the special development, which Indian social usages make necessary, to the general rules of English Law, which protect persons, whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind. That the instrument here is a *wakfnama* is a mere accident, and the general and well-settled law of *wakf* is not in question. The case of an illiterate *purdanashin* lady, denuding herself of a large proportion of her property without professional or independent advice, is one on which there is much authority. Independent legal advice is not in itself essential [*Kali Baksh Singh's case* (2)]. After all, advice, if given, might have been bad advice, or the settlor might have insisted on disregarding it. The real point is, that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act of the person who makes it [*Wajid Khan's case* (3) ; *Sunitabala*

2. L R (1913) 41 I A 23 : 26 M L J 121 (P C).
3. L R (1891) 18 I A 144 at 148.

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Debi's case (4)]. The appellant clearly had no such advice, nor is it contended that she had. If, however, the settlor's freedom and comprehension can be otherwise established, or if, as is the respondents' case here, the scheme and substance of the deed were themselves originally and clearly conceived and desired by the settlor, and were then substantially embodied in the deed, there would be nothing further to be gained by independent advice. If the settlor really understands and means to make the transfer, it is not required that some one should have tried to persuade her to the contrary. Again, the question arises how the state of the settlor's mind is to be proved. That the parties to prove it are the parties who set up and rely on the deed is clear. They must satisfy the Court that the deed has been explained to and understood by the party thus under disability, either before execution, or after it under circumstances which establish adoption of it with full knowledge and comprehension [*Sudisht Lal's case* (5); *Sham Koer's case* (6); *Sajjad Husain's case* (7)]. Further, the whole doctrine involves the view that mere execution by such a person, although unaccompanied by duress, protest or obvious signs of misunderstanding or want of comprehension, is in itself no real proof of a true understanding mind in the executant. Evidence to establish such comprehension is most obviously found in proof that the deed was read over to the settlor and, where necessary, explained. If it is in a language which she does not understand, it must, of course, be translated, and it is to be remembered that the clearness of the meaning of the deed will suffer in the process. The extent and character of the explanation required must depend on the circumstances. Length, intricacy, the number and complexity of the dispositions, or the unfamiliarity of the subject-matter, are all reasons for requiring an increased amount and efficiency of explanation. Thus a matter not likely to attract the attention of the executant in itself ought not to be relied on as binding, unless her attention has been directly drawn to it [*Sham Koer's case* (6)]. So if the deed, as presented for execution, differs substantially, either by way of addition or of omission, from the scheme and details which the intending settlor has previously laid down, the discrepancy ought to be clearly pointed out and its nature and effect should be fully described, unless, which must be rare, the difference is so obvi-

4. L R (1919) 46 I A 272 at 278 : 37 M L J 483 (P C).
5. L R (1881) 8 I A 39 at 43.
6. L R (1902) 29 I A 132 at 137.
7. L R (1912) 39 I A 156 : 23 M L J 210 (P C).

ous that even a person in the settlor's position must perceive and appreciate it for herself. If the description and explanation have been partial or erroneous, or have not been given at all, the question will then arise, as it arises where there has been no independent legal advice, whether, if proper information had been given, it would have affected the mind of the executant in completing the deed. On the other hand, the doctrine cannot be pushed so far as to demand the impossible. The mere declaration by the settlor, subsequently made, that she had not understood what she was doing obviously is not in itself conclusive. It must be a question whether, having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them. Of course fraud, duress and actual undue influence are separate matters.

In the present case it is quite clear that certain matters were not brought to the appellant's notice before the deed was executed, or at all. Not only was a second *mutawalli* with an additional salary introduced into the draft which was executed, but it made no provision for the settlor's desires as to the maintenance and repair of the mosque in Ahmedpur and as to the various religious ceremonies mentioned by her to Jamal-ud-din, beyond including them among the objects on which the *mutawallis* might expend the *wakf* funds, if and so far as they thought proper. As the deed stands, the *mutawallis* could decline to continue any of the special pious observances which the appellant desired to continue, and could leave her to maintain them herself out of her diminished income and to die in the knowledge that, with her, these objects would have no one left to care for them.

Their Lordships cannot regard these matters as insignificant or such as the plaintiff could reasonably be supposed not to insist upon. She was a woman of property, who had lived all her married life in her own family-house, hard by, as it would seem, to the mosque erected by her relations. Hers had been a lonely and restricted existence. Karim-ud-din, as a husband, was in many respects a very disappointing person. His own means were small, and for many years his official duties caused him to reside at a distance. She was herself piously disposed, and it was eminently natural in such a woman

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under such circumstances that she should attach importance to the instructions, which she gave to her husband through Jamal-ud-din. Her piety may well have manifested itself primarily in her care for the mosque, which her family had founded, and for the celebration of the observances to which she herself had diligently attended. If she had really appreciated that in none of these cases was that perpetual continuance assured, which was evidently dear to her mind, their Lordships are far from being satisfied that she would have patiently submitted to her disappointment and have accepted intelligently and without a word the surrender of her own preferences to the discretion of the *mutawallis*. The only prudent and probable conclusion is that, as the words were read over to her, she failed, very naturally, to observe the change. She would hear mention of the mosque and of nearly all the ceremonies by name, and would easily miss the difference between the inclusion of these objects in the powers of the *mutawallis* and the prescription of these objects as obligatory charities to be maintained by the *mutawallis* in any event. They are confirmed in this view by observing that, until a late stage in the argument before the Board, this precise discrepancy between the first draft of the *wakfnama* and its ultimate form had not attracted the attention of anybody, either in the Courts below or on this appeal. No doubt, where so many other points were in contest, this one might well pass unobserved, but this circumstance only makes it the more likely that the appellant could not herself detect what has, in fact, eluded the vigilance of counsel and judges during two protracted hearings. It is not proved when or by whom the original draft was remodelled. There is no evidence that Wazir-ud-din so much as knew that the appellant had given any particular instructions before the scheme was put into writing, and he could not draw the appellant's special attention to something that he never knew. Upon the story told by the respondents' witnesses there never was any chance that those, who explained the deed, should point out these matters, and it is certainly not enough to say that, if the appellant cared about them, she should herself have asked about them, especially as the form of the deed was such as might well have misled her into taking it for a provision of all that she desired. From this point of view the appellant's subsequent action does not assist the respondents. Registration and mutation were promptly asked for by those interested in supporting the deed, and the plaintiff herself

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attended the proceedings without protest. These circumstances are in themselves very favourable to the respondents' case, but the registering officer, who says that he read and explained the deed to her, knew as little of the above-mentioned discrepancies as did Wazir-ud-din, and the appellant's answers are quite consistent with her being in ignorance of a change, of which no one had informed her. As the respondents have to bear the onus of bringing home to her mind the actual import of the deed, they cannot rely on the fact that the appellant's own evidence is untrustworthy, for it is by the evidence of their own witnesses alone that this defect is established, and by that evidence they must stand. The conclusion that they have failed to discharge the burthen of proof is one arrived at not out of any consideration for this lady in particular, but in defence of those strict rules which have been laid down for the protection of the defenceless in India, and it is a matter of obligation upon their Lordships to be strict and unwavering about it. They will accordingly humbly advise His Majesty that the appeal should be allowed, and that the decree passed by the learned Subordinate Judge should be restored with costs here and in both Courts below.

Solicitors for appellant : *Barrow, Rogers and Nevill.*

Solicitors for respondents : *T. L. Wilson and Co.*

A. de M. *Appeal allowed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD SHAW, LORD CARSON, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI.

Vaithialinga Mudaliar and others ... *Appellants**

v.

Srirangath Anni and others ... *Respondents.*

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Hindu Law—Widow's interest in husband's estate—Position of reversionary heirs to the estate—Adverse possession against widow—Judgment after trial in suits by or against widow—Possessory suits involving issue of validity of adoption—Limitation Act (IX of 1871), Sch. II, Art. 129—Limitation Act (XV of 1877), Sch. II, Art. 141.

A Hindu widow is entitled to the beneficial use and enjoyment of her husband's estate during her life. She also represents the estate in suits brought by or against her for possession of that estate or any part of it, and she and the

*P C Appeals Nos. 122 to 130 of 1923. 2nd April, 1925.

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reversionary heirs of the estate are bound by any final decree of Court, duly and properly obtained, after fair trial, and free from any collusion or fraud.

Nobin Chunder Chuckerbutty v. *Issur Chunder Chuckerbutty*, (1868) 9 Suth. W. R. (Civil), 505; *Katama Natchiar* v. *Rajah of Shivagunga*, (1863) 9 Moore's I. A. 539; *Aumirtolall* v. *Rajoneekant Mitter*, L. R. (1875) 2 I A 113; *Jugol Kishore* v. *Maharajah Jotindro Mohun Tagore*, L. R. (1884) 11 I. A. 66; *Partab Narain Singh* v. *Trilokinath Singh*, L. R. (1884) 11 I A 197; *Hurrinath Chatterji* v. *Mohunt Mothoor Mohun Goswami*, L. R. (1893) 20 I A 183; *Chaudhri Risal Singh* v. *Bulwant Singh*, L. R. (1918) 45 I. A. 168 followed.

Ranchordas Vandrawandas v. *Parvathibai*, L. R. (1899) 26 I A 71 distinguished.

A suit brought to establish any rights, but involving necessarily the determination of the validity or invalidity of an adoption as the basis of such rights fell under Art. 129 of Sch. II to the Limitation Act (IX of 1871).

Jagadamba Chowdhrani v. *Dakhina Mohun*, L. R. (1886) 13 I. A. 84 followed.

Nine consolidated appeals from a decree, dated 15th November, 1916, of the High Court, modifying a decree, dated the 4th September, 1908, of the Subordinate Judge of Negapatam.

The main facts and arguments appear from the judgment of their Lordships.

Sir G. Lowndes, K. C., W. Wallach and *M. R. R. Pillai* for Vaithialinga Mudaliar and others.

J. M. Parekh for Srirangath Anni and others.

L. de Gruyther, K. C., and *K. V. L. Narasimham* for Somasundaram Chettiar and A. Rangasami Chettiar.

2nd April, 1925. The Judgment of the Board was delivered by

Sir John Edge.

SIR JOHN EDGE.—These are nine consolidated appeals from a decree, dated the 15th November, 1916, of the High Court at Madras, which varied a decree, dated the 4th September, 1908, of the Subordinate Judge of Negapatam.

The suit in which these appeals have arisen was brought in the Court of the Subordinate Judge on the 2nd July, 1905, by three plaintiffs, who were reversioners of Arunachala Mudaliar, against thirty-eight defendants for the possession of lands which were alleged by the plaintiffs to be lands of the Kulikara estate in the District of Tanjore and for mesne profits. The title of the plaintiffs to sue was denied by the defendants on various grounds, of which those which are now important and have to be considered are whether the suit was not barred by the result of a litigation which began in 1887 and

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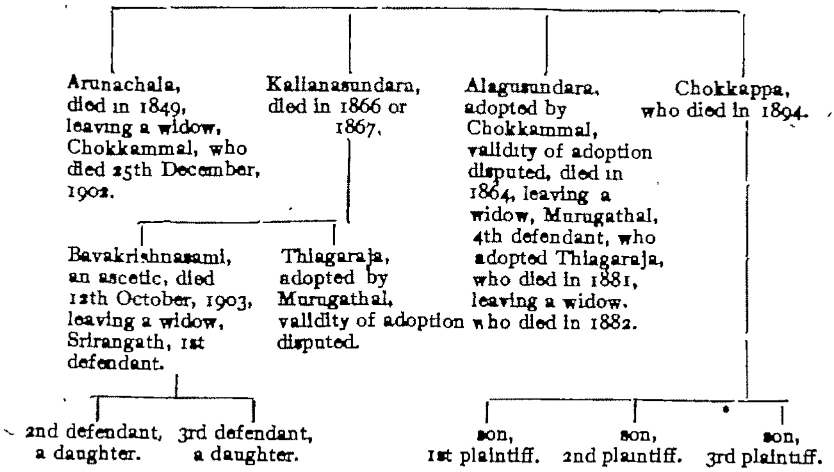
ended with a final decree in 1892, and whether the suit was not otherwise barred by the law of limitation.

The Kulikara estate admittedly belonged to Arunachala when he died in 1849. He was then about twenty-two years of age. The family to which he belonged were Hindus of the Sudra caste. He had been adopted by Vaithialinga Mudaliar, a relation, who was descended from an ancestor from whom Arunachala also was descended. The plaintiffs are the three sons of Chokkappa Mudaliar, who was the youngest of three brothers by birth, that is, natural brothers, of Arunachala. Arunachala died childless, leaving a widow, Chokkammal, who died on the 25th December, 1902, within twelve years before this suit was instituted. She was a defendant to the suit with which the litigation of 1887 commenced. It will be necessary to refer at some length to that litigation. The following pedigree will show Arunachala and his natural brothers and some other persons :—



Arunachala, as whose reversioners the plaintiffs claim to be, had before his death directed his wife Chokkammal to adopt as a son to him his natural brother Alagusundara. In 1862 Chokkammal did as a fact adopt Alagusundara as a son to her late husband. Alagusundara was a younger natural brother of Arunachala, and at the time of the adoption there was no one living who could give him in adoption. As a matter of Hindu Law the adoption was invalid.

In 1862 Chokkammal, having adopted Alagusundara, put him in possession of the immoveable property now in question, reserving to herself for her maintenance some of the immove-

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able property to which she was entitled as the widow of Arunachala. With the property which she reserved for her maintenance this suit is not concerned. There can be no doubt that in 1862 Chokkammal did put Alagusundara in possession of the property now in question. In March, 1862, she presented an undated petition to the Tahsildar of Nannilam, the Revenue Officer, in which she stated that, with the consent of her husband, she had adopted Alagusundara, his natural younger brother, and, with the exception of certain villages which she named, she had made him proprietor of all the land and other properties, etc., standing in her name, and prayed that, with the exception of the three villages, the *miras* (ownership) might be transferred to him and all the sircar proceedings might be passed in his name.

Alagusundara continued to be in possession of the property of which Chokkammal had put him in possession in 1862 until he died in 1864, and had dealt with the property which had been transferred to him as an absolute owner would have done. Upon his death in 1864 his elder brother Kalianasundara, on the 18th July, 1864, presented a deed of consent to the Tahsildar of Nannilam praying for the transfer to the name of Thiagaraja of the property which stood in the name of Alagusundara, and the *miras* was transferred to him. Thiagaraja was by birth a son of Kalianasundara and had been adopted by Alagusundara. He was in 1864 about two years of age.

From the 18th July, 1864, Kalianasundara, until he died in September, 1876, was referred to in all documents relating to the property as the guardian of Thiagaraja, who was in possession of the property in question from 1864 until he died in 1881, and during that time the management of the affairs of the family was carried on solely in his name. Upon the death of Thiagaraja in 1881 the *miras* which had stood in his name was altered to the name of his widow Kamalath, a girl of about 12 years of age, who died in 1882. Upon the death of Kamalath in 1882, Murugathal, the mother by adoption of Thiagaraja, took possession of the property in question for a Hindu widow's interest and held it until 1884, when Chokkammal forcibly ejected her.

On the 9th February, 1887, Murugathal brought a suit in the Court of the Subordinate Judge of Negapatam against Chokkammal and others, in which she claimed a decree for the possession of the properties now in question, alleging in

her plaint that her husband Alagusundara had been the adopted son of Arunachala, and that the properties which she claimed belonged to him as such adopted son, and had been enjoyed by him from 1862 until he died in 1864; that after his death her adopted son Thiagaraja had enjoyed them until he died in 1881, and after him his widow, Kamalath, got them according to Hindu Law and she died childless in 1882, and since her death she, Murugathal, got them under Hindu Law and enjoyed them until 1884, when Chokkammal forcibly took possession of them and enjoyed them adversely to her. Chokkammal in her written statement in that suit denied Murugathal's title, alleged that she, Chokkammal, had been in possession of the property in question for 38 years from the death of her husband Arunachala in 1849, and denied that Alagusundara had been adopted. Several issues were framed by the Subordinate Judge in that suit, who found that Alagusundara was adopted as a son to Arunachala in 1862 by Chokkammal, who had the authority of her husband to make the adoption, that the adoption was invalid according to Hindu Law, that Thiagaraja was adopted by Murugathal under the authority of her husband, but that the course of conduct of Chokkammal and the change of position of Alagusundara as the result of his adoption made it inequitable to hold that he had not title to the property and that the putting him in possession of the property in question and allowing him to manage it for his own purposes substantially operated as a gift of the property to him. The Subordinate Judge in that suit also held that Murugathal's claim of adverse possession of the *miras* for twelve years was established, and on the 18th December, 1889, he gave her a decree for possession of the property which she claimed. From that decree of the Subordinate Judge the suit of 1887 went on appeal by Chokkammal to the High Court at Madras. The learned Judges of the High Court held that Alagusundara's adoption was invalid, but holding that Murugathal's claim of adverse possession for twelve years was established, by their decree of the 17th August, 1892, dismissed Chokkammal's appeal. Chokkammal did not appeal from that decree of the High Court, and it became final.

It is necessary to consider what was Chokkammal's position as a Hindu widow and how far her acts could, according to Hindu law, bind the reversioners to her husband. On Arunachala's death in 1849 she became entitled to the full

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beneficial enjoyment of the estate which had been his at the time of his death. As Mr. Mayne, in paragraph 605 of his "Hindu Law and Usage," correctly, in their Lordships' opinion, said :—

> "It was at one time common to speak of a widow's estate as being one for life. But this is wholly incorrect. It would be just as untrue to speak of the estate of a father under the Mitakshara law as being one for life. Hindu law knows nothing of estates for life, or in tail, or in fee. It measures estates, not by duration, but by use. The restrictions upon the use of an estate inherited by a woman are similar in kind to those which limit the powers of a male holder, but different in degree."

The Hindu widow has not power to make a gift of the estate. Handing over the possession of the estate to a son whom she has validly adopted to her deceased husband is not making a gift of the estate to him. The estate became his on his adoption if he was validly adopted. She has no power to sell or assign the estate except for necessity, so as to bind her husband's reversioners after her death. But she represents the estate in suits brought by her or against her for possession of the estate or any part of it, and she and the reversioners are equally bound by any final decree which a Court makes in such a suit provided that the suit was fought out according to law and was not collusive or fraudulent.

In the suit 1887 Chokkammal was no doubt personally interested to defeat Murugathal's claim for the possession of lands which had been in her own possession as the widow of Arunachala from 1849 until 1862, but although her object in resisting Murugathal's claim was probably a purely personal and selfish object, she did, in fact and in law in that suit, represent the estate as well as her own interests as a Hindu widow. The suit of 1887 was not a collusive suit ; it was regularly and according to due procedure at law fought out in the Court of the Subordinate Judge and in the High Court.

A protracted argument was submitted to the Board on the question whether under Hindu law adverse possession against a widow in possession of an estate for a Hindu widow's interest bars the reversioner. While it is not necessary in the view which will later be announced by the Board on the question of limitation in this case to make any formal pronouncement upon this point, it may be convenient to say that the authorities referred to were as follows :—In *Goluckmonee Dabee* v. *Degumber Dey* which was decided in 1852, Sir Lawrence Peel, who was the Chief Justice of the Supreme Court at Calcutta, said :—" It has been invariably considered for many

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years that the widow" (speaking of the widow as heir)" fully represents the estate, and it is also settled law that adverse possession which bars her bars the heir also after her, which would not be the case if she were a mere tenant for life, as known to the English law." [*See* the reference to that case in the judgment of Sir Barnes Peacock, C. J., in *Nobin Chunder Chuckerbutty* v. *Issur Chunder Chuckerbutty and others* (1)].

In *Katama Natchiar* v. *The Rajah of Shivagunga* (2), which was decided by the Board in 1863, the Board, consisting of Knight Bruce, L. J., Sir Edward Ryan, and Turner, L. J., the assessors being Sir Lawrence Peel and Sir James W. Colvile, all being eminent lawyers, and three of them having had judicial experience in India, Lord Justice Turner delivered the considered judgment of the Board, and in it said, at page 603 as follows :—

"It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in *Anga Mootoo Natchiar's* lifetime, would have bound those claiming the *Zemindary* in succession to her. And their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the *Zillah* Court by any person claiming in succession to *Anga Mootoo Natchiar*. For, assuming her to be entitled to the *Zemindary* at all, the whole estate would for the time be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance would seem to apply to the case of a Hindoo widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

The declaration as to Hindu law which their Lordships have quoted from the considered judgment of the Board, which was delivered by Lord Justice Turner in 1863, has in the present appeal been objected to on the ground that it was *obiter*. The following cases however were referred to as showing that the doctrine there set forth was in accord with the course of judicial decisions.

Their Lordships will first refer to the case *Nobin Chunder Chuckerbutty* v. *Issur Chunder Chuckerbutty* (1), which came before a Full Bench of the Calcutta High Court, 1867, in which the declaration of the Board in the *Shivagunga case* (2) to which their Lordships have referred was accepted as a

1. (1868) 9 W R (Civil), 595 at 597. 2. (1863) 9 M I A 539.

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correct statement of the Hindu law to which it related and was applied to the case before the Full Bench. The facts of the case before the Full Bench are not fully stated in the order of reference to the Full Bench, but they were as follows : One Ramdoollub Chuckerbutty died possessed of an estate consisting of lands leaving two sons, two daughters and his widow, Dhone Mala. The two sons died without issue in the lifetime of the widow, and upon their death the widow, Dhone Mala, became entitled to the possession of the respective estates of the sons, but the defendant in that suit, a stranger, and as a trespasser, took possession of the estate more than twelve years before the suit, and the widow never obtained possession. Upon the death of the widow, sons of the daughters, who were the reversioners to their uncle's estate, brought the suit for possession, which was before the Full Bench in second appeal. The first Appellate Court had dismissed the suit as not brought within time, that is, within twelve years from the time when the defendant had wrongfully taken possession, and the question before the Full Bench was whether the suit was barred by limitation or whether the reversioners could sue upon the death of the widow, Dhone Mala. The Full Bench held that the cause of action arose when the defendant had taken possession and that the suit was time barred. The Full Bench was an exceptionally strong Bench of Judges, who had much experience in cases involving considerations of Hindu law. Their Lordships will give extracts from the judgments which were delivered in the Full Bench, as those judgments appear to their Lordships to confirm the declaration as to Hindu law which they have quoted from the judgment of the Board in the *Shivagunga* case(2) and to have a direct bearing on the appeal before the Board, and are very instructive.

In delivering his judgment in that Full Bench case, with which Seton-Karr, J., concurred, Sir Barnes Peacock, C. J., after referring to Sir Lawrence Peel's judgment already mentioned, said :

"It was also held by the Privy Council in the *Shivagunga case* (2) that in the absence of fraud or collusion a decision against a widow, with regard to her deceased husband's estate, would be binding upon the reversionary heirs....................If the female heir in the present case had sued the wrong doer, and without fraud or collusion had failed to make out her case to turn him out of possession, the reversionary heirs would have been bound by the decision. I am assuming that they are not claiming through the female heir."

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2. (1863) 9 M I A 539.

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Farther on Sir Barnes Peacock said :

"It is said that the reversionary heirs could not sue (for possession) during the lifetime of the widow, and that therefore they ought not to be barred by any adverse holding against the widow at a time when they could not sue. But when we look at the widow as a representative, and see that the reversionary heirs are bound by decrees relating to her husband's estate which are obtained against her without fraud or collusion, we are of opinion that they are also bound by limitation, by which she, without fraud or collusion, is barred."

Jackson, J., in his judgment, said :

"I entirely concur in the opinion of the Chief Justice that the plaintiff (the reversionary heir) was barred in the present case. . . It has been distinctly held by the Privy Council in the *Shivagunga* case that a decision fairly arrived at without fraud or collusion in the presence of a Hindu widow in possession of the estate will bind reversionary heirs. That being so decided, it appears to me impossible to escape the conclusion that an adverse possession which barred the widow will also bar the heirs, and in that opinion we are fully and strongly supported by the decisions of the late Supreme Court in the cases to which his Lordship the Chief Justice has referred."

Phear, J., in his judgment, said :

"I too desire to avoid pledging myself to all the illustrations which have fallen from the Chief Justice ; but with this exception, I concur entirely in the reasoning which he has given in support of his conclusions, and I concur also in the remarks which have been made by Mr. Justice Jackson. I will add that it seems to me that when a reversionary (Hindu) heir succeeds to the property of his ancestor on the death of an intervening female heir, he takes substantially the same proprietary right as she enjoyed, and no more, though doubtless she was fettered in a way that he is not, with regard to the dealings with the property, viz., her alienations are often liable to be avoided by him when he succeeds to the right of succession."

Macpherson, J., in his judgment, said :

"I also concur in the proposed answer. But a very great difference exists between the case immediately before us and the case in which a mother or other Hindu female having an estate similar to that of a childless widow has herself alienated property belonging to the estate which she has taken as heiress, without sufficient reason for making such alienation. In the latter case, the alienation is good as against her, and so far as her own life-interest is concerned. Therefore, in fact, no cause of action necessarily arises at all with respect to her alienation so long as she lives. The cause of action does not arise until her death, when the reversioner's cause of action for the first time accrues. In the case before us, the property having never reached the hands of the mother (the Hindu widow) at all, having been throughout held adversely to her, the cause of action (of the reversioner) accrued in the mother's lifetime, and therefore a suit to recover possession, by whomsoever it may be brought, is barred unless instituted within twelve years from the commencement of the adverse possession."

In *Aumirtolall Bose* v. *Rajoneekant Mitter* (3), the decision of the Full Bench at Calcutta in *Nobin Chunder Chuckerbutty* v *Issur Chunder Chuckerbutty* (1) was cited in argument,

1. (1868) 9 W R (Civil) 505. 3. L R (1875) 2 I A 113.

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and Sir Barnes Peacock, in delivering the judgment of the Board, affirmed that decision.

In *Jugol Kishore* v. *Maharajah Jotindro Mohun Tagore* (4), which was before the Board in 1884, where a Hindu widow's right, title and interest in property had been sold in execution of a money decree, the Board, without a suggestion of dissent from the ruling, said, at page 73, " It was held in the *Shivagunga case* (2) that although a widow has for some purposes only a partial interest, she has for other purposes the whole estate vested in her ; and that in a suit against a widow in respect of the estate the decision is binding upon the reversionary heir. " The Board also said :

"If the suit is simply for a personal claim against the widow, then merely the widow's qualified interest is sold (in execution of the decree) and the reversionary interest is not bound by it(the sale). If, on the other hand, the suit is against the widow in respect of the estate, or for a cause which is not a mere personal cause of action against the widow, then the whole estate passes."

In *Partab Narain Singh* v. *Trilokinath Singh* (5), which was before the Board in 1884, the Board said, at page 207 :

"It is sufficient for the present purpose to hold that, until she had appointed another to be owner and representative, the Maharanee's estate in the taluk was sufficient to constitute her the full representative of it in the former suit. Her estate was at least as large as that of a Hindu widow in her husband's property. What was said by this Board of the widow's estate in the *Shivagunga* case is applicable to here."

In *Hurrinath Chatterji* v. *Mohunt Mothoor Mohun Goswami* (6), which came before the Board in 1893, it was held that the rule in the *Shivagunga case* (2) to the effect that an adverse decree against a Hindu widow binds those claiming in succession applies equally to the case of the daughter. It had been argued in that case that the adverse title alleged was founded on something which was independent of limitation, and that the Limitation Act (XV of 1877) let the reversionary heir sue within twelve years from the time when his right to possession accrued. With reference to that argument, Lord Watson, at page 188, said :

"But you must show that the new law gives a right of action to a reversioner notwithstanding that the widow's right of possession had been extinguished by decree."

Owing to the fact that it did not appear from the judgment of the Board when Pearimoni, who was the second wife of Ramanundun Goswami, had died, beyond the fact that she was living when he died in 1847, there was some hesitation in referring to that case in the argument of this appeal. Mr. de

2. (1863) 9 M I A 539.
4. L R (1884) 11 I A 66.
5. L R (1884) 11 I A 197.
6. L R (1893) 20 I A 183.

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Gruyther has, however, shown from the Appeal Record of that case, which is preserved in the Privy Council Office, that Pearimoni died in 1855.

In *Chaudhri Risal Singh* v. *Bulwant Singh* (7), which was before the Board in 1915, Chaudhri Risal Singh, alleging that he was the reversionary heir of Jagat Prakash Singh, brought a suit against Bulwant Singh for possession of immoveable property known as the Landhaura estate. The property there claimed had belonged to Raja Raghubir Singh until he died childless in 1868. Raghubir Singh left a widow, Rani Dharam Kunwar, who bore to him a posthumous son, Jagat Prakash Singh, who died in 1870. Rani Dharam Kunwar had the authority of her husband to make successive adoptions. In 1877 she adopted to her husband a boy who died within three years after he had been adopted, and then she adopted another boy, who died in 1885, and in 1890 she adopted Bulwant Singh, the defendant to the suit. She continued in possession of the property, alleging that her husband Raghubir Singh had by his will left it to her for her life. After a time Rani Dharam Kunwar and Bulwant Singh quarrelled. She was claiming a right to manage the property during her life ; he was claiming his full rights as an adopted son. The result was that, on the 7th January, 1905, Rani Dharam Kunwar brought a suit in the Court of the Subordinate Judge of Saharanpur against Bulwant Singh, in which she claimed to have it declared that she had no power to adopt Bulwant Singh and had never validly adopted him, and to have her registered deed of adoption, in accordance with which she had adopted him, declared void and ineffectual against her. He alleged that Rani Dharam Kunwar had power to adopt him, and had validly adopted him. The Subordinate Judge, holding that Rani Dharam Kunwar was estopped from denying that she had validly adopted Bulwant Singh, dismissed her suit. She appealed to the High Court at Allahabad, and the High Court, also holding that Rani Dharam Kunwar was estopped, dismissed her appeal. Thereupon she appealed to His Majesty in Council. The Board in that appeal considered the evidence in that suit, and having come to the conclusion that Rani Dharam Kunwar had validly adopted Bulwant Singh and that her appeal should be dismissed, advised His Majesty accordingly. In the judgment the Board, at page 178, said :

"There can be no doubt in their Lordships' opinion that Rani Dharam Kunwar in her suit against Bulwant Singh did, notwithstanding the personal

7. L R (1918) 45 I A 168 : 36 M L J 597 (P C).

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estoppel under which she laboured, represent the estate on the question of fact as to whether Bulwant Singh had or had not been validly adopted, and that she represented the estate within the meaning of the rule in *Katama Natchiar* v. *Rajah of Shivagunga* (2). The principle of law to be applied in such cases was, their Lordships consider, correctly summarized by Banerji, J. in his judgment in this case, thus: 'Where the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir.' It cannot be said that there had not been a fair trial by the Board in 1912 of the right in the suit of Rani Dharam Kunwar against Bulwant Singh. The right in that suit was his right to the estate as a son validly adopted to Raja Raghubir Singh."

Upon the other side it was asserted the principle of the *Shivagunga* case might have been applied and had not been applied in the case of *Runchordass Vandrawandas* v. *Parvathibai* (8) which came before the Board in 1899. The suit in that case was brought on the 21st December, 1888, against Vandrawandas and the Advocate-General of Bombay by Cursondas Govindjee as the heir-at-law of Kallianji Sewji, who had died on the 6th January, 1869, leaving two widows—Cooverbai, who died in 1871, and Nenavahoo, who died in 1888. Kallianji Sewji had made a will, which was proved on the 2nd March, 1869, by three executors, who were trustees, of whom the first defendant to the suit was at the date of the suit the sole survivor. The three trustees were appointed by the testator as trustees for *dharam*—that is, to make gifts for charitable or religious purposes. The will contained the following clause: "As to the estates which have been given by me to my wives, they are to enjoy the rent of the said estates during their natural lives, and on the death of my wives the said estates are to revert to my *dharam*, and whatsoever income may be derivable from the said estates is to be expended for my *dharam*." The main question in the suit was whether the gift for charitable or religious purposes was void for vagueness and uncertainty, and the High Court at Bombay and the Board in appeal held that it was void and that the trustees took no interest under the will. The suit was brought after the death of Nenavahoo.

It appears to their Lordships that part of the property claimed by the reversioner had been property of the respective widows as their *stridhan*, as to which there was some question as to the "rights of the heir" and that other parts of the property claimed was property which had been in the possession

2. (1863) 9 M I A 539. 8. L R (1899) 26 I A 71.

of the widows, to which the reversionary heir, the plaintiff, in the ordinary course, was clearly entitled, and that the Board was considering how an account, which the Courts below had ordered to be prepared, should be worded so as to show those two classes of property.

The defence of limitation was raised, but the Board held that it did not apply, saying :—

> "It is not necessary to consider what might be the case if the widows or the survivor of them were suing, as the plaintiff does not derive his right from or through them, and the extinguishment of their right would not extinguish his."

It has been maintained that the Board was not intending to discredit the rule in the *Shivagunga case* (2). What the Board was considering was the wording of an account which the Appellate Court and the First Court had ordered to be prepared. The judgment of the Board was delivered by Sir Richard Couch in 1899, who in 1893 had delivered the judgment of the Board in *Hurrinath Chatterji* v. *Mohunt Mothoor Mohun Goswami* (6) which expressly approved of and applied as sound Hindu Law the rule in the *Shivagunga case* (2). What was said by the Board in 1899 at the conclusion of the judgment makes it plain what the Board was considering. It is there said :—

> "The decree of the First Court, dated the 27th July, 1896, should not have been varied as it has been. It is for an account of the moveable property left by Cooverbai and Nenavahoo at the time of their deaths distinguishing between such of it as was their *stridhan* and 'as such' formed part of the estate of the testator. 'As such' appears to be an error for 'such as'. With this alteration their Lordships think the decree will be right."

As altered by the Board the account which was to be taken was an account of the moveable property left by Cooverbai and Nenavahoo, the widows of the said testator respectively at the time of their deaths distinguishing between such of the said property as was the *stridhan* of the said Cooverbai and Nenavahoo and such as formed part of the estate of the said testator.

It does not appear to their Lordships how the rule in the *Shivagunga case* (2) could have been applied in the case then before the Board. What the Board, at the stage of the suit which was then before the Board, the Board having decided against the trust to the trustees, was considering was what was the account which was to be taken, and the Board directed that the account should separately show what had

2. (1863) 9 M I A 539. 6. L R (1893) 20 I A 183.

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been the *stridhan* of the widows, and what was the property to which the heir might ordinarily be entitled. Their Lordships are unable to see what was the estate, within the meaning of the *Shivagunga case* (2), which the widows had represented, or to what the rule in the *Shivagunga case* (2) could have been applied. The title of the trustees to the property devised or bequeathed to them for charitable or religious purposes by Kallianji Sewji was not questioned until the survivor of the two widows died in 1888, and that property had never been represented by the widows or either of them. It had been in the exclusive possession of the trustees under the will of Kallianji Sewji from 1869 until the Court in the suit which was brought on the 21st December, 1888, after the death of the last surviving widow, had decided that the gift for charitable or religious purposes was void.

The result of the case to which their Lordships have referred shows, in their opinion, that the Board has invariably applied the rules of the *Shivagunga case* (2) as sound Hindu Law where that rule was applicable.

It also appears to their Lordships that the suit is barred by limitation. The plaintiffs could not be entitled to a decree for possession without displacing the adoption of 1862 of Alagusundara by Chokkammal. It was held by the Board in *Jagadamba Chowdhrani* v. *Dakhina Mohun* (9) that Art. 129 of the Second Schedule of Act IX of 1871 relates to all suits in which the plaintiff cannot succeed without displacing an apparent adoption by virtue of which the defendant is in possession. That article prescribed twelve years as the period of time within which a suit "to establish or set aside an adoption" might be brought, and that such period of twelve years should begin to run from "the date of the adoption, or (at the option of the plaintiff) from the date of the adoptive father's death."

Act IX of 1871 did not give to a reversioner whose right to sue for possession accrued upon the death of a Hindu widow any further time than the twelve years given by Art. 129 to any plaintiff. That Act was in force until the 19th July, 1877, when Act XV of 1877, the Indian Limitation Act, 1877, came into force, and by Art. 141 of the Second Schedule of Act XV of 1877 a Hindu entitled to the possession of immoveable

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2. (1863) 9 M I A 539. 9. L R (1886) 13 I A 84.

property on the death of a Hindu female might bring his suit for possession within twelve years from the time when the female dies. In the present case the period of limitation allowed by Art. 129 of Act IX of 1871 expired in 1874.

The person who at the date of the adoption in 1862 was entitled to sue to set aside the adoption must have been a reversioner to Arunachala, and looking at the pedigrees he must have been either Kalianasundara or Chokkappa, and it has not been pleaded or otherwise alleged that they were at the time of the adoption under the age of 18 years so as to entitle them to an extension of the period allowable to a minor under S. 7, Act IX of 1871, to bring a suit. It is obvious, looking at the facts and dates in the present case, that Kalianasundara and Chokkappa must have arrived at full age long before Act IX of 1871 expired and that that Act applied.

In the present suit the Subordinate Judge found that the question as to the adoption of Arunachala was *res judicata*, but Sir John Wallis, C. J., and Mr. Justice Burn, in the appeal to the High Court, decided that the principle of *res judicata* did not apply. On that subject their Lordships do not consider it necessary to express an opinion.

It has been arranged by the parties through their respective Counsel and their respective solicitors in the best interests of their clients that the plaintiffs' appeal, No. 124 of 1923, and the first defendant's appeal, No. 128 of 1923, which relates to the village of Enkan, should be dismissed, and that there should be no order as to costs in either of these appeals in which other respondents have not appeared. It has also been arranged by the parties through their respective Counsel and their respective solicitors in the best interests of their clients that the plaintiffs' appeal, No. 125 of 1923, should be dismissed without costs on either side, the plaintiffs having admitted that the late husband of the first defendant was not disqualified from inheriting along with the plaintiffs. Except as above arranged by the parties it appears to their Lordships that all the appeals should be dismissed with costs, and their Lordships will so accordingly humbly advise His Majesty.

Since the hearing of these appeals some of the parties, their Lordships understand, have entered into compromises. On production of the proper evidence, effect to these compromises will be given in the Order in Council confirming this report.

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Solicitors for Vaithialinga Mudaliar and others : *T. L. Wilson and Co.*

Solicitors for Srirangath Anni and others : *Chapman Walker and Shephard.*

Solicitor for Somasundaram Chettiar and A. Rangasami Chettiar : *D. Grant.*

A. de M. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Donepudi Narasayya and another...*Petitioners** (*Petitioners*)

v.

Chiguluri Venkiah and others ... *Respondents* (*Counter-petitioners* 1 *to* 16 *and* 18 *to* 22, 24 *and* 26, 27, 29 *to* 46).

Narasayya v. Venkiah.

Criminal Procedure Code, S. 145—Proceedings under—Dropping of, after preliminary order—Jurisdiction of Magistrate—Opportunity to petitioner to prove likelihood of a breach of the peace—Omission to give—Effect—Money in Court deposit representing sale proceeds of crops on property attached pending proceedings—Order proper as to—Order directing payment of same to either party—Validity.

Proceedings under S. 145 of the Code of Criminal Procedure are not taken in the interests of private parties but for the preservation of the public peace, and if the Magistrate is satisfied that the likelihood of the breach of the peace either did not exist or that it has ceased to exist, it is the proper duty of the Magistrate to drop proceedings under the section and withdraw from interfering with the rights of parties in the property.

On an application made under S. 145, Criminal Procedure Code, the Magistrate passed a preliminary order under the section and directed the parties to attend his Court and to file written statements of their respective claims as regards the possession of the subject-matter in dispute. At a subsequent stage, however, the Magistrate became satisfied that there was no likelihood of a breach of the peace, and he dropped the proceedings, and passed no orders under the section regarding possession of the property.

Held, that the Magistrate was perfectly entitled to drop the proceedings, and that his action in doing so could not be objected to on the ground that he gave no opportunity to the petitioner to show by evidence that there was a likelihood of the breach of the peace.

Pending proceedings under S. 145, Criminal Procedure Code, the property in dispute was put under attachment and the crops were sold and certain moneys realised were deposited in Court. The Magistrate, who dropped the proceedings under the section on the ground that there was no likelihood of a breach of the peace, however, passed an order directing the deposit to be given over in the main to the counter-petitioner.

Held, that the Magistrate had no jurisdiction to order the payment of the money deposited to the counter-petitioner.

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*Cr R C No. 681 of 1924 (Cr R P No. 573 of 1924). 22nd April, 1925.

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The proper order to be made in such a case is to direct the money to be kept in deposit in Court till one or other of the parties produces a decree of a Civil Court to show his right to that money. On the production of such a decree the money will be paid to the party entitled to it.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order, dated 7th June, 1924, of the Court of the Sub-divisional Magistrate of Masulipatam in Mis. Case No. 16 of 1923.

V. L. Ethiraj and *K. Venkatarama Raju* for petitioners.

The Public Prosecutor (*J. C. Adam*) for the Crown.

The Court made the following

ORDER :—This is an application to revise certain proceedings passed by the Sub-divisional Magistrate, Masulipatam, in connection with an application filed by the petitioner asking the Magistrate to take action under S. 145 of the Criminal Procedure Code. The Magistrate stating that he was satisfied that there was a dispute likely to cause a breach of the peace passed a preliminary order under S. 145 and directed the parties to attend his Court and to file written statements of their respective claims as regards the possession of the subject-matter in dispute. At a subsequent stage, the Magistrate became satisfied that there was no likelihood of a breach of the peace and he, therefore, dropped the proceedings and passed no orders under S. 145 regarding possession of the property.

The first point taken before me in revision is that the Magistrate was not entitled to drop proceedings without giving an opportunity to the petitioner to show by evidence that there was a likelihood of the breach of the peace and the Magistrate's conclusion that there was no likelihood of the breach of the peace from information received was incorrect. It is contended that, without an opportunity being given to the parties to show the existence of the likelihood of the breach of peace, a Magistrate who has started proceedings under S. 145, Criminal Procedure Code, cannot cancel or drop them. This does not seem to me to be the law at all, for, as pointed out in *Manindra Chandra Nandi* v. *Barada Kanta Chowdhry* (1), where this very question was raised and considered, "a party to a proceeding under S. 145 is not in the position of a plaintiff in a civil suit who has set the Court in motion and has a right to require a decision upon the questions raised by him. If a

1. (1902) I L R 30 C 112.

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Magistrate either refuses to make an order under sub-section (1) of S. 145, or, having made such an order, subsequently cancels it on the ground that a dispute does not exist likely to cause a breach of the peace, no private person has any *status* to contest the propriety of his refusal to make an enquiry into the question of possession." It must be borne in mind that proceedings under S. 145 are not taken in the interests of private parties but for the preservation of the public peace and if the Magistrate is satisfied that the likelihood of the breach of the peace either did not exist or that it has ceased to exist, it is the proper duty of the Magistrate to drop proceedings under S. 145 and withdraw from interfering with the rights of parties in the property. The case in *Manindra Chandra Nandi* v. *Barada Kanta Chowdhry* (1) in which this very question was raised and decided by a Bench of that Court— Calcutta High Court—is against the contention now raised by the petitioner. That ruling has been followed in this Court by Spencer, J. in *Suryanarayana* v. *Rajah Ankineed Prasad* (2) and I am prepared to take the same view. I do not think it is open to a party to come up here and say that the Magistrate had no business to drop proceedings on the ground that there was no likelihood of a breach of the peace without giving him an opportunity to show that there was such a likelihood. It is the Magistrate's duty to be satisfied that there is no breach of peace in his district. If he is so satisfied, it is not for a private party to object. Clause (5) of S. 145 provides for a special case where as the Magistrate is proceeding with the trial of the question of possession, the parties to the proceedings or even other persons who are interested are given the right to show that no dispute likely to cause a breach of the peace exists or has existed. The existence of this clause does not take away the power of the Magistrate himself to drop proceedings if he is satisfied that there is no further likelihood of the breach of the peace. The first objection therefore fails.

The main point in the case however is as regards the order passed by the Magistrate about the deposit in Court. While the proceedings were going on in his Court the property seems to have been put under attachment and the crops seem to have been sold and certain moneys realised were deposited in Court. The Magistrate has passed an order directing the deposit to be given over in the main to the

1. (1902) I L R 30 C 112. 2. (1924) I L R 47 M 713 : 46 M L J 565.

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counter-petitioner excepting a small sum of Rs. 5-8-0 to be paid to the petitioner before me on proving his title. On this point it has been contended before me that, having dropped the proceedings under S. 145, the Magistrate is *functus officio* and has no jurisdiction to pass any further orders in the case. That contention is supported by two decided cases in this Court—*Chenga Reddi* v. *Ramaswami Goundan* (3) and *Natesa Naicken* v. *Raghavachariar* (4). On the contrary, there is a case in *Mahalakshmi* v. *Subbarayadu* (5) which has been followed in *Suryanarayana* v. *Rajah Ankineed Prasad* (2), which says that a Magistrate may pass orders directing that the income or profits obtained by sale of the crops on the land should be given over to the person who raised the crops or from whose possession the property was taken. As pointed out in *Chenga Reddi* v. *Ramaswami Goundan* (3) and *Natesa Naicken* v. *Raghavachariar* (4) it is this very point that is in dispute in a proceeding under S. 145, as to who was in possession of the land, and, if the Magistrate is not going to make an enquiry to find out who was in such possession on the ground that there is no further likelihood of the breach of the peace and drops proceedings, it seems to me to be hardly correct for him to say that the sale proceeds of the crops should be handed over to the person who raised the crops. That means the Magistrate has to come to a conclusion as regards the very question that he is not going to consider. I am inclined to follow the rulings in *Chenga Reddi* v *Ramaswami Goundan* (3) and *Natesa Naicken* v *Raghavachariar* (4) in preference to that in *Mahalakshmi* v. *Subbarayadu* (5). I notice that in *Mahalakshmi* v. *Subbarayadu* (5) the counter-petitioners were not represented and the order was in favour of the petitioner who apparently made out the crops had been taken from him. The Magistrate had directed that the money should be kept in deposit to enable the party entitled to it to get a decree of a Civil Court to show his title. It seems to me that that was the proper order in the case. I think it is not right for the Magistrate after having dropped the proceedings to make any further orders. He must leave the parties to settle their rights in the manner they think best to do, in the meanwhile holding his hands. In this case, therefore, I set aside the order of the Magistrate directing payment of the

2. (1924) I L R 47 M 713 : 46 M L J 565. 3. (1914) 1 L W 1032.
4. (1924) 20 L W 924. 5 (1922) 17 L W 429.

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money deposited to the counter-petitioner. The money will be kept in deposit in Court till one or other of the parties produces a decree of a Civil Court to show his right to that money, and, on the production of such a decree the money will be paid to the party entitled to it.

With this variation the petition must be dismissed.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE PHILLIPS.

Kuppuswami Mudaliar ... *Appellant** (*Plaintiff*)

v.

Chockalinga Mudaliar ... *Respondent* (*Defendant*).

Kuppuswami Mudaliar v. Chockalinga Mudaliar.

Limitation Act, Art. 142—Applicability—Suit for possession—Title and possessory title.

A suit by a plaintiff for recovering possession of land alleging title by purchase and that the defendant dispossessed his vendor falls under Art. 142 Limitation Act. There is nothing in Art. 142 to show that it applies only to suits based on possessory title and not to suits for possession based on title.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of East Tanjore at Mayavaram in A. S. No. 65 of 1921 preferred against the decree of the Court of the Principal District Munsif of Tiruvalur in O. S. No. 365 of 1917.

C. Narasimhachariar and *N. Sundaresa Aiyar* for appellant.

S. Varadachariar for respondent.

The Court delivered the following

JUDGMENT :—The facts of this case are stated in the Lower Appellate Court's judgment. Both the Lower Courts have dismissed the suit as being barred by limitation applying Art. 142. There were three items of property in the suit and although an appeal is preferred as regards all the three it is not now pressed as regards the third item, as admittedly the suit is barred by O. 21, R. 63, so far as that item is concerned. As regards the other two items the appellant's contention is that Art. 144 and not Art. 142 is applicable to this case. It is not disputed that if Art. 142 is applicable, Art 144 cannot be invoked, as it is merely a residuary Article. The argument is that Art. 142 has no application to suits for possession based on title, but that it refers only to suits based on possessory title, that is to say, that if a man has title and is in

* S. A. No. 1701 of 1922. 17th July, 1925.

possession and is dispossessed, it is open to him to sue under Art. 142, because he was in possession, for the restoration of that possession ; but he need not do that, but may bring his suit under Art. 144 basing his claim on title as opposed to possessory title. There is nothing in the Article itself to support this contention, nor does the point appear to have been considered in any of the cases cited before me, or decided one way or the other. The argument seems to be put forward in order to get rid of the applicability of Art. 142. As against this argument I may refer to three cases decided by the Privy Council, namely : *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (1) ; *Mahammad Amanulla Khan* v. *Badan Singh* (2) and *Dharani Kanta Lahiri* v *Gabar Ali Khan* (3). It is clear that all these three suits were based on title and although an argument has been attempted to show that the title set up was a mere possessory title, I do not think it can be sustained, more especially as regards the case reported in *Mahammad Amanulla Khan* v *Badan Singh* (2). These three cases were held to be governed by Art. 142, and consequently if we accept the contention now put forward, it necessarily involves the conclusion that these three cases have been wrongly decided. Reliance is placed on other cases decided by the Privy Council in support of the argument put forward by the appellant : *Secretary of State for India* v. *Chellikani Rama Rao* (4) ; *Kuthali Muthavar* v. *Kunharankutty* (5) ; *Kumar Basanta Kumar Roy* v. *The Secretary of State for India in Council* (6) and *Radha Gobind Roy Saheb* v. *Inglis* (7). In *Secretary of State for India* v *Chellikani Rama Rao* (4) the plaintiff was a person who claimed by reason of adverse possession. There was no suggestion that he had ever been dispossessed and therefore it was clearly not a suit under Art. 142. In *Kuthali Muthavar* v. *Kunharankutty* (5) the plaintiff established his title to the land and also acts of possession, and against that the defendant set up other acts of possession which were not held to constitute adverse possession against the plaintiff. The question of dispossession does not seem to have been considered at all and therefore I cannot consider that the case is an authority for the contention put forward. In *Kumar Basanta Kumar Roy* v. *The Secretary of State for India in Council* (6) and *Radha Gobind Roy*

1. (1888) I L R 16 C 473 (P C) 2 (1889) I L R 17 C 137 (P C).
3. (1912) 25 M L J 95 (PC). 4. (1916) I L R 39 M 617 : 31 M L J 324 (P C).
5. (1921) I L R 44 M 883 : 41 M L J 650 (P C).
6. (1917) 21 C W N 642 : 32 M L J 505 (P C).
7. (1880) 7 Cal L R 364 (P C).

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Saheb v. *Inglis* (7) there was no question whatever of dispossession and consequently Art. 142 would not apply. In none of these cases is any reference made to the three cases first mentioned clearly because the facts are quite different. The case in *Mohima Chunder Mozoomdar* v *Mohesh Chunder Neoghi* (1) seems to me to be directly applicable here. In *Vasudeo Atmaram Joshi* v. *Eknath Balkrishna Thite* (8) there is an *obiter dictum* of Heaton, J., which is approved by a single Judge of this Court in *Peria Jeeyangarswami* v. *Esoof Sahib* (9). It is as follows :—

> "It was indeed urged that it is a general principle that any one suing in ejectment must prove possession within twelve years and the authorities seem to bear out that contention : but the reason for this is that possession is commonly the effective assertion of title which is relied on and the cases accordingly deal with that particular kind of assertion of title. But it is not the only one ; there is another which in some cases is equally good ; and that is an assertion of title made in Court and established by a decree........ (such title) is good against them also and entitles to possession whether the title-claimant has or has not been in possession within twelve years."

This exception to the general rule does not appear to be applicable to the facts of the present case. We find, moreover, another remark in the same judgment :—

> "I do not think that Art. 142 has any application to claims which neither in terms nor in substance are claims to possession, made necessary by reason of dispossession or discontinuance of possession."

This judgment of Heaton, J. has given rise to the argument that in the present suit there was no dispossession of the plaintiff. It is not disputed that there was dispossession of his predecessor-in-title, nor is it disputed that plaintiff can have no better rights than his vendor. If there had been no dispossession by the defendant, that is to say, if defendant had not come into possession by dispossessing the plaintiff's vendor or some other person, the plaintiff would have no cause of action against the defendant, for defendant would not be in possession if he had never dispossessed anybody, for there is no suggestion that defendant merely occupied the property when vacant. It is admitted in the plaint that he did come into unjust possession by dispossessing Vythialingam, plaintiff's vendor, and in the plaint itself the cause of action is said to have arisen on the 11th of July, 1905, the date on which the defendant unjustly took possession in pursuance of an order of Court. The suit is clearly based on this dispossession and

1. (1888) I L R 16 C 473 (P C). 7. (1880) 7 Cal L R 364 (P C).
8. (1910) I L R 35 B 79. 9. (1924) 21 L W 398.

Kuppuswami Mudaliar v. Chockalinga Mudaliar.

the Article applicable is Art. 142. That being so, the burden is on the plaintiff to prove that he was in possession within twelve years of the suit. Both the Lower Courts have found that he has not proved this, and this finding is not attacked here.

On that finding this second appeal must fail and is dismissed with costs.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE MADHAVAN NAIR.

P. V. Veeranan Ambalam ... *Petitioner* (Defendant)*

v.

Ayyachi Ambalam ... *Respondent (Plaintiff).*

Veeranan Ambalam v. Ayyachi Ambalam.

Indian Contract Act, Ss. 30 and 65—Chit fund—Wagering agreement—Suit for recovering subscriptions paid—If lies—Agreement to repay subscriptions—If severable from rest of agreement.

A chit fund consisted of 500 subscribers, each subscribing Rs. 2 per mensem. At the end of each month a chit was drawn by lot and the winner was paid Rs. 100 and thereafter his connection with the chit fund ceased altogether. The drawings were to go on for 50 months when the chit fund would be wound up, the stakeholder paying back to the subscribers who had won no prize the total amount subscribed by each of them. After subscribing for 48 instalments, one of the subscribers sued the stakeholder for the amounts subscribed by him together with interest. *Held,* (1) the transaction was a lottery and the agreement between the promoter and subscribers constituted a wagering agreement within the meaning of S. 30, Indian Contract Act. *Shanmuga Mudali* v. *Kumaraswami Mudali,* 21 L W 403 dissented from ; *In re Duraiswami Mudaliar and another,* 1 Weir 251 ; *Richards* v. *Starck,* (1911) 1 K B 296 ; 27 L T R 49 followed ; *Kamakshi Achari* v. *Appavu Pillai,* (1863) 1 M H C R 448 ; *Vasudevan Nambudri* v. *Mamood,* (1898) I L R 22 M 212 distinguished ; (2) the agreement to repay the subscriptions was not severable from the prize arrangements and therefore could not be made the basis of a suit ; and (3) nor could the plaintiff invoke the aid of S. 65, Indian Contract Act, as the agreement was void for illegality from its very inception and it was not a case of the agreement becoming void or being discovered to be void. Opinion of Odgers, J. in *Nagappa Pillai* v. *Arunachalam Chetty,* (1924) 47 M L J 876 followed.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Melur, dated 12th March, 1923, in S. C. S. No. 1281 of 1922.

A. N. Krishna Aiyangar for petitioner.

K. V. Srinivasa Aiyar for respondent.

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*C R P No. 644 of 1923. 23rd September, 1925.

Veeranan Ambalam v. Ayyachi Ambalam.
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Spencer, J.

The Court delivered the following

JUDGMENTS :—*Spencer, J.* :—Two questions have been argued in this Civil Revision Petition. The first is whether the chit transaction, in which the petitioner was the promoter and the respondent was a subscriber, partook of the character of a lottery or consisted of wagering agreements between the subscribers and the promoter. The second is whether the respondent is entitled to recover the money which he subscribed either upon the terms of the contract between him and the petitioner, or by reason of the obligation cast by S. 65, Indian Contract Act, upon persons who have received any advantage, of restoring it upon an agreement or contract becoming void or being discovered to be void.

The mere fact that the order in which members of a Mutual Benefit Society take their benefits is determined by the drawing of lots does not constitute the transaction a lottery [vide *Wallingford* v. *Mutual Society* (1)].

In the particular form of chit transaction that is before us, 500 persons undertook each to subscribe two rupees at each instalment and there were to be 50 drawings at each of which the winner was to get Rs. 100 and walk out without any liability to subscribe for any subsequent instalments. In other words, the promoter laid odds of 98 to 2 at the first drawing against any particular subscriber drawing the winning ticket. At the second drawing he laid odds of 96 to 4 with each of the remaining 499 subscribers, and so on till 50 drawings had taken place and 50 subscribers had drawn the prize of Rs. 100.

The promoter was secure against loss as he got two rupees from each of the 500 subscribers for the first instalment and he paid out only Rs. 100 to the winner. After the 50th drawing those who had not drawn a prize were entitled to get their money back without interest. The promoter was able to pay the prizes to those who drew the winning numbers out of the subscriptions paid into his hands by the others, and he recouped himself from loss at the end by putting the money left in his hands from each instalment of subscriptions out to usury and pocketing the interest The chance of getting a prize of Rs. 100 for a payment of two rupees at the first drawing, four rupees at the second and six rupees at the third and so on, free from any further liability to the winner, was the bait for attracting investors. The adventitious character of the gains also had the effect of making the whole transaction

1. (1880) 5 A C 685.

Veeranan Ambalam v. Ayyachi Ambalam.

Spencer, J.

a lottery and the agreements between the promoter and the subscribers wagering agreements within the meaning of S. 30, Contract Act. All who took part in what the law regards as an unlawful transaction were *in pari delicto,* and no participator in it can invoke the help of the law for enforcing his claims to recover any money entrusted to any person to abide the result of the drawings, even though the return of sums subscribed by those who were not lucky enough to draw winning tickets was one of the conditions of the transaction. I agree with the opinion of Odgers, J. in *Nagappa Pillai* v. *Arunachalam Chetty* (2) that the agreement to repay the subscriptions in a case like this is not severable from the prize arrangement. Neither can a subscriber invoke S. 65 of the Contract Act, for the agreement in this case did not become void nor was it discovered to be void but it was void for illegality from its inception [*see* Indian Contract and Specific Relief Acts by Pollock and Mulla, 4th Edition, pp. 365-368] ; and the object of the subscription, which was the formation of an association for conducting an unlawful system of lottery has been accomplished. When money has been paid under an illegal contract which has been partially carried into effect, it cannot be recovered back [vide *Kearley* v. *Thomson* (3)].

The respondent's vakil relied upon *Shanmuga Mudali* v. *Kumaraswami Mudali* (4), which, with due respect, I feel difficulty in regarding as a decision based on sound principles That case and the one before us possess the common feature that the prize winners in the first 50 drawings were not bound to subscribe to instalments after they had won a prize. The significance of this feature in a chit transaction, which makes it a gamble, has been missed by the learned Judges. In *In re Duraiswami Mudali and another* (5) there was a similar feature in a chit transaction and it was observed by Collins, C.J and Shepherd, J. : " This is clearly a lottery, for it depends entirely on the drawing of lots whether or not the prize of Rs. 100 falls to any given subscriber. As the prize-winner thereafter ceases to be a subscriber to the fund, it must necessarily follow that the rest out of whose subscriptions the prize has been paid and who continue to be subscribers, are the losers. " In *Shanmuga Mudali* v. *Kumaraswami Mudali* (4) Venkatasubba Rao, J. expresses an opinion that the fact that

2. (1924) 47 M L J 876. 3. (1890) 24 Q B D 742.
4. (1925) 21 L W 403 at 414: I L R 48 M 661 at 675.
5. Cr R C No. 305 of 1890 (1 Weir's Rulings, p. 251).

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the money for the prizes really comes out of the interest on the capital fund contributed differentiates this case from other cases of lotteries. He says at p. 409 : " What the 449 members lose is the interest upon their money and what the first 49 members gain is a portion of the interest thus lost by the other subscribers. " But in *Richards* v. *Starck* (6) it was held that the loss of interest upon a subscriber's subscription was a sufficient loss to make a contract resting on a future event of an uncertain nature a gaming or wagering contract. In the present chit transaction, out of 500 subscribers there were 450 losers of interest on their money deposited with the promoter. The remaining 50 made a gain, the amount of which varied according to an order determined by the drawing of lots, which thus depended not on skill but on pure chance.

It is true, as Ramesam, J. observes, that the Criminal Law by S. 294-A, Indian Penal Code, only makes punishable the keeping of an office for holding a lottery and the publication of proposals for drawing a lottery. The Civil Law however goes further and prevents obligations arising out of lotteries being enforced in a Court of Law, whether the lottery is held in an office to which the public have access or in a private place to which admission is not to be had for the mere asking. The learned Judges were evidently much influenced in their decision by the case of *Wallingford* v. *Mutual Society* (1). That was a case of legitimate business free from speculation in which there were no losers and no one gained an unearned sum of money by the chance of drawing lots. The same may be said of the *kuri* chit dealt with in *Vasudevan Nambudri* v *Mammad* (7).

The Civil Revision Petition is allowed with costs and the plaintiff's suit is dismissed.

Plaintiff and defendant will each bear their own costs in the trial of the Small Cause Suit in the District Munsif's Court.

Madhavan Nair, J.

Madhavan Nair, J. :—I have had the advantage of reading my learned brother's judgment with which I agree. The suit which has given rise to this Civil Revision Petition was instituted by the respondent for the recovery of a sum of Rs. 119-13-5, being the principal and interest due to him on account of the 48 instalments of subscriptions paid by him to a chit fund conducted by the petitioner. The chit fund con-

1. (1880) 5 A C 685. 6. (1911) 1 K B 296.
7. (1898) I L R 22 M 212.

sisted of 500 subscribers, each subscribing Rs. 2 per mensem. At the end of each month, a chit was drawn by lot and the winner was paid Rs. 100. Thereafter his connection with the chit fund ceased altogether and he was not under any obligation to continue his subscriptions. According to the rules of the fund, the drawings would thus go on for 50 months when the chit fund would be wound up, the stakeholder paying back to the remaining subscribers the total amount subscribed by each of them. The respondent, a non-prize-winner, after subscribing for 48 instalments asked the petitioner, the stakeholder, to return to him with interest the money he had subscribed. The petitioner refusing to refund the amount contended that the chit fund was a lottery and that a suit was not maintainable to recover the amount. The learned District Munsif holding that the chit in question is not a lottery so far as non-prize-winners like the plaintiff are concerned, gave him a decree for the amount claimed.

It is argued for the petitioner that the transaction set forth above constitutes "agreements by way of wager" between the stakeholder and the subscribers and, as such, is void both on principle and on the authority of the decisions of this Court and that, therefore, the decree of the Lower Court should be set aside. In *Sunkunni* v. *Ikkora Kirtti* (8) it was held by Phillips, J., that a "*kuri*" conducted on similar lines is a lottery and that the plaintiff's suit to recover the money paid is not maintainable. This decision was followed by Krishnan and Odgers, JJ. in *Nagappa Pillai* v. *Arunachalam Chetty* (2), though the learned Judges differed on the question whether it was possible to hold that the agreement to repay the subscriptions at the end of the period was severable from the arrangement to give the prize. In *Shanmuga Mudali* v. *Kumaraswami Mudali* (4) Ramesam and Venkatasubba Rao, JJ., did not follow these decisions, their opinion being mainly influenced by a decision of the House of Lords in *Wallingford* v. *Mutual Society* (1). It may be stated that the chit fund in all those cases was conducted in the same manner as in the present case, the successful drawer of the ticket having nothing to do with the chit fund after drawing his prize.

In the light of these decisions and of what is meant by an "agreement by way of wager," we have to determine whe-

1. (1880) 5 A C 685. 2. (1924) 47 M L J 876.
4. (1925) 21 L W 403 : I L R 48 M 661. 8. (1919) M W N 570.

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ther the present case has been rightly decided by the learned District Munsif.

The Indian Contract Act does not contain any definition of a "wagering contract." S. 30 states that agreements by way of wager are void. In *Thacker* v. *Hardy* (9) Cotton, L. J. said : "The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns one way *A* will lose, but if it turns out the other way *B* will win." In *Subramania Pattar* v. *Kiradadasan* alias *Thirumalapad Avergal* (10) it was pointed out that in a chit fund transaction the contracting parties are the stakeholder on the one side and each of the subscribers on the other side and there are as many separate contracts as there are subscribers. On analysis it will be found that the contract of the stakeholder with the subscribers in the present case partakes of the nature of a wagering contract. As pointed out in my learned brother's judgment, "The promoter laid odds of 98 to 2 at the first drawing against any particular subscriber drawing the winning ticket. At the second drawing he laid odds of 96 to 4 with each of the remaining 499 subscribers and so on till 50 drawings had taken place and 50 subscribers had drawn the prize of Rs. 100." This shows that the arrangement is really a bet between the subscribers and the stakeholder as to how a future event of an uncertain nature, *i. e.*, the drawing of a winning ticket will eventually turn out. If a subscriber happened to draw one of the "winning tickets" *i. e.*, if the uncertain event turned one way, obviously he would gain an increased amount of money ; would he lose, if the event turned out the other way ?

Since, according to the rules, the non-prize-winners get back their subscription-amount, it is argued that the present case falls within the principle of the decisions in *Iyyanar Kone* v. *Vidoomada Kone* (11), *Kamakshi Achari* v. *Appavu Pillai* (12) and *Vasudevan Nambudri* v. *Mammod* (7) wherein it was held that, in chit fund transactions to which subscribers contribute monthly subscriptions, each subscriber in his turn as determined by lot taking the entire subscription for one month, there was no element of chance or risk, the money paid by each

7. (1898) I L R 22 M 212.
9. (1878) 4 Q B D 685.
10. (1912) M W N 1235.
11. S A No. 169 of 1857—Madras S D 1858, p. 53.
12. (1863) 1 M H C R 448.

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subscriber being eventually returned to him. In *Kamakshi Achari* v. *Appavu Pillai* (12) such a transaction was thus characterised by the learned Judges : " It is not the case of a few out of a number of subscribers obtaining prizes by lot. By the arrangement all get a return of the amount of their subscriptions. It is simply a loan of the common fund to each subscriber in turn, and neither the right of the subscribers to the return of the contributions, nor to a loan of the fund is made a matter of risk or speculation. No loss appears to be necessarily hazarded, nor any gain made a matter of chance." I do not think the same can be said of the transaction in the present case. I have already shown how the subscribers' gain is made a matter of chance. As regards the loss, the plaintiff, no doubt gets back the entire capital which he has subscribed. In one sense, therefore, it is true that the transaction involves no loss in any event to the plaintiff as he is to have his money returned to him *but he loses his interest.* In England it has been pointed out in two cases of wagering contracts, similar in this respect(*viz.* loss of interest) to the present case, that this " loss of interest " is " sufficiently a loss to bring the contract within the spirit, though not perhaps within the actual wording of the definition" of a wagering contract. [See *Richards* v. *Starck* (6)]. In *In re Duraiswami Mudali and another* (5), in which also, as in the case before us, the prize-winner after securing the prize ceased to be a subscriber, the fund closing after a stated period with a refund of their subscriptions to the unsuccessful members, it was held by Collins, C. J. and Shepherd, J. that the transaction is clearly a lottery " for it depends entirely on the drawing of lots whether or not the prize of Rs. 100 falls to any given subscriber." The learned Judges state : " As the prize-winner thereafter ceases to be a subscriber to the fund, it must necessarily follow that the rest, out of whose subscriptions the prize has been paid and who also continue to be subscribers, are the losers. The case, therefore, is quite different from that in *Kamakshi Achari* v. *Appavu Pillai* (12)." These decisions were not brought to the notice of the learned Judges in *Shanmuga Mudali* v *Kumaraswami Mudali* (4).

In my view, the agreement in this case shows that the plaintiff gave his subscriptions to the defendant upon the terms

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4. (1925) 21 L W 403 : I L R 48 M 661.
5. Cr R C No. 305 of 1890 (1 Weir's Rulings, p. 251).
6. (1911) 1 K B 296 and 27 L T R 49. 12. (1863) 1 M H C R 448.

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that, in an uncertain future event, he was to recover, if that event went one way, the sum subscribed with considerable increment ; and, in the other event, he was to recover the total amount subscribed by him but without interest. This means that the transaction is, in substance, a wagering contract, which may be described, in the language of Channel, L. J. in *Richards* v. *Starck* (6), " as a bet on terms very favourable to the plaintiff. "

For the above reasons I am of opinion that the decisions in *Iyyanar Kone* v. *Vidoomada Kone* (11), *Kamakshi Achari* v. *Appavu Pillai* (12) and *Vasudevan Nambudri* v. *Mammod* (7) are clearly distinguishable and that the chit fund transactions in this case is an agreement by way of wager and is, therefore, void.

In the decision in *Shanmuga Mudali* v. *Kumaraswami Mudali* (4) strongly relied on by the respondent, the learned Judge, Venkatasubba Rao, J., states : " There is some element of chance in regard to the first 49 subscribers ; but the dominant feature of the transaction is that it enables a large number to gradually lay by money and receive their savings in a lump sum and the scheme is, in their case, an incentive to thrift. " With due respect to the learned Judge, I am inclined to think that it cannot be said that the primary object of a person in taking a chit in a fund like the present one is to lay by money for receiving it back in a lump sum. The chance of winning a prize of Rs. 100 on payment of a subscription of Rs. 2 at the first drawing, Rs. 4 at the second drawing and so on during the fifty drawings is the attraction which tempts the subscribers to join in such a chit fund.

In arriving at their conclusion the learned Judges in *Shanmuga Mudali* v. *Kumaraswami Mudali* (4) were mainly influenced by the decision of the House of Lords in *Wallingford* v. *Mutual Society* (1). In that case a society called the " Mutual Society " was registered under the Companies Act Its declared object was to accumulate capital by means of monthly subscriptions from members, to advance such capital to the members on rotation, to secure payment of such advances by taking over and holding real or other securities and ultimately to divide among the members all the profits that

1. (1880) 5 A C 685. 4. (1925) 21 L W 403 : I L R 48 M 661.
6. (1911) 1 K B 296. 7. (1898) I L R 22 M 212.
11. S A No. 169 of 1857—Madras S. D. 1858, p. 58.
12. (1863) 1 M H C R 448.

had been made. The whole mode of operation of the Society appeared to be this : To obtain subscriptions from members, to advance them money on interest upon "certificates of appropriation". By Art. 27 it was declared that "appropriations shall be allotted in two ways, the first and every fourth one thereafter, by drawing, free of any premium or interest, while those intermediate shall be allotted to the member or members tendering the highest premium for the same respectively". All appropriations were to be repaid by equal quarterly payments extending over twenty years from the advance. It was held that, though the benefits of the society were made available to the members by a process of periodical drawings, the society did not come within the mischief of the Lottery Acts and that the transaction it carried on was not a gambling transaction. The facts of the case show that amongst the subscribers there were no losers and no one derived any undue gain by the chance of drawing lots. As pointed out in 15 Halsbury 301 : "Where the scheme has for its object the carrying on of a legitimate business, the fact that it provides for the distribution of its profits, in certain events, by lot will not vitiate the scheme." The case resembles the decisions in *Kamakshi Achari* v. *Appavu Pillai* (12) and *Vasudevan Nambudri* v. *Mammod* (7) already referred to and on principle is clearly distinguishable from the present case. It may be mentioned that Ramesam, J. deals with the case in *Shanmuga Mudali* v. *Kumaraswami Mudali* (4) as a suit to enforce the terms of a contract *collateral* to another transaction which can be enforced, even when the main transaction is void on account of being a wagering contract, unless it amounts to an offence punishable by law ; though in the course of the judgment the learned Judge agrees with Venkatasubba Rao, J. that the main contract itself is not void.

The respondent argues that, if the transaction is an agreement by way of wager and is invalid on that account, he is still entitled to get a refund of the amount claimed by him either under S. 65 of the Indian Contract Act, or on the ground that the agreement to return tht amount is severable from the arrangement to give the prize. I entirely agree with the opinion of Odgers, J. in *Nagappa Pillai* v. *Arunachalam Chetty* (2) for the reasons given by him in that judgment that

2. (1924) 47 M L J 876. 4. (1925) 21 L W 403 : I L R 48 M 661.
7. (1898) I L R 22 M 212 12. (1863) 1 M H C R 448.

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the claim of the respondent in this case cannot be substantiated on either of the above grounds.

In the result I must hold that the decision of the learned District Munsif is wrong, and this Civil Revision Petition must be allowed with costs as ordered by my learned brother.

T. S. V. *Revision Petition allowed.*

PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Patna.]

PRESENT :—LORD PHILLIMORE, LORD CARSON AND SIR JOHN EDGE.

Homeshwar Singh and others ... *Appellants**

v.

Jugal Kishore Marwari and another ... *Respondents.*

P. C. — Homeshwar Singh v. Jugal Kishore Marwari.

Contract for felling and buying timber in fixed monthly instalments for four years—Clause providing for stoppage of felling and determination of contract on failure of any monthly instalment—Shortage in two instalments—Notice of determination of contract—Reasonableness thereof—Breach going to the root of the contract.

Certain timber-cutters contracted in writing with the Zamindar of a forest in Bhagalpur for four years to cut and pay for five lakhs of sleepers from the trees in the forest, such sleepers being of certain specified dimensions, and to be cut at the rate of 15,000 sleepers monthly, or 135,000 yearly, reckoning from the month of Kartik up to the end of Asarh. Without paying in full for the sleepers cut in any one month the contractors had no right to cut or prepare sleepers in the succeeding month ; and on the expiry of such succeeding month, the Zamindar could stop further cutting and determine the contract.

In the first month, the contractors cut 1,055 sleepers only, and 3,432 sleepers in the second ; whereupon the Zamindar gave them notice of determination of the contract.

In an action by the contractors for wrongful determination of the contract, *held,* (reversing the judgment of the High Court, and restoring that of the Subordinate Judge), that the contractors' failure constituted a breach going to the root of the contract, which justified the Zamindar's notice of determination, and that such notice was reasonable, and the contract rightly determined.

Cross-appeals (consolidated) from the judgment, dated 14th February, 1922, of the High Court (Dawson Miller, C.J. and Bucknill, J.) which reversed a judgment of the Subordinate Judge of Bhagalpur (A. N. Chatterji, Esq.).

The facts and arguments appear from the judgment of their Lordships.

L. de Gruyther, K. C. and *S. Hyam* for Homeshwar Singh and others.

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*P C Appeal No. 32 of 1924. 29th June, 1925.

P. C.
Homeshwar Singh v. Jugal Kishore Marwari.
Lord Phillimore.

A. M. Dunne, K. C., K. Brown, and *G. D. MacNair* for Jugal Kishore Marwari and another.

29th June, 1925. The Judgment of the Board was delivered by

LORD PHILLIMORE.—This case turns upon the construction of a contract made between a landowner in the district of Bhagalpur, the deceased father of the appellants in the main appeal, and two persons interested in the purchase of timber whom it will be convenient to call the contractors.

By this contract, made on the 23rd May, 1915, the landowner sold to the contractors the right of cutting 5 lakhs of sleepers to be cut from Sakhua trees in the landowner's jungle. The sleepers were to be in defined quantities of six different dimensions—the longest 12 feet in length and the shortest 3 feet—with varying differences in breadth and thickness, and valued at separate prices.

The whole were to be cut before June, 1919, so that there was a period of four years for performing the contract. But it was in contemplation, as the contract shows, that 15,000 sleepers would be cut each month during the nine dry months of the year and 135,000 at least a year, the contractors also undertaking to do their best to cut some sleepers during the three wet months.

The contractors made a deposit of Rs. 6,000 which was about the equivalent of the average cost of 30,000 sleepers or two months' production.

The nine dry months began in the month of Kartik which runs from the 23rd October to the 21st November. Before this month the contractors had cut 187 sleepers, but in the first month instead of cutting 15,000, they only cut 1,055. In the second month they cut 3,432, and the whole number they cut before they were finally stopped was less than 9,000.

The contractors put forward for an excuse for their delay that the landowner had promised to provide a sawing machine, but both Courts decided that this excuse was not established.

On the 22nd December the second month had elapsed, and on the 23rd the landowner gave notice to determine the contract and stop further cutting.

On the same day the lawyer for the contractors wrote that they were willing to pay the price of 30,000 sleepers and they followed it up by a letter of the 31st which purported to be a reply to the landowners' notice of the 23rd.

P. C.

Homeshwar Singh v. Jugal Kishore Marwari.

Lord Phillimore.

This attempt of the contractors to put forward their letter of the 24th as containing an offer made before the letter of cancellation reached them, failed in the view which both Courts took of the evidence, and it stands that upon the failure to produce 15,000 sleepers in the course of the first month, the landowner determined the contract; and the sole question is whether in doing so, he was within his rights.

The contractors insisting that the contract had been improperly determined, brought this action on the 30th April, 1916, claiming Rs. 617,876 as damages.

The Subordinate Judge dismissed the action, but intimated that if the action had lain, the damages in his view would have been Rs. 600,000.

The High Court at Patna reversed this judgment and declared that there had been a breach of contract, but considered the damages claimed excessive and awarded Rs. 200,000 only. Both parties have appealed from this decision.

The matter turns upon three paragraphs in the contract, Nos. 3, 5 and 6: and the translation of them is as follows:—

"3. We, the second party, shall during the term each year from the month of Kartik up to the end of Asarh, get 15,000 sleepers of every measurement prepared every month, and shall, after they are counted according to the contract, pay to the first party the price thereof according to the rates mentioned above, without any objection to this neither we, the second party, nor our representatives shall raise any objection. If we do so, the first party shall be competent to cancel this deed and stop the cutting of the trees in the lands specified below without waiting for the expiry of the term of this agreement. Be it noted that during the term (of the lease) every year from the month of Sravan to the end of Aswin, we, the second party, shall try our best to cause as many sleepers of different measurements prepared as possible and after getting them counted according to the contract pay the price thereof in accordance with the rates mentioned above, to the first party on taking receipt therefor. The second party shall, on no account, without sufficient reason willingly stop the preparation of sleepers during these three months. Let it be known that we, the second party, will have to prepare 1,35,000 (one lakh and thirty-five thousand) sleepers of different measurements every year during the nine months from Kartik to Asarh, in accordance with the terms specified above. If, through negligence on the part of us, the second party, we fail to prepare so many sleepers no plea regarding deficiency in the number of sleepers, put forward by us, shall be entertained and we, the second party, shall be held liable to pay on demand, the price of the entire number of 1,35,000 sleepers to the first party.

"5. The sleepers, which we, the second party, shall get ready shall be counted every week on behalf of the first party and seals and numbers shall be put on them on behalf of the first party. If this work cannot be managed to be done every week, it should be done every month. But the second party shall, on no account, be entitled to take away the sleepers after they have been

P. C.

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counted, sealed and numbered, unless they have paid the price thereof. The second party shall obtain receipt for whatever money they pay for the sleepers from the manager of the first party. No plea of payment without receipt shall be entertained. If, through negligence, the sleepers may not be counted, sealed and numbered on behalf of the first party, the second party shall be at liberty to serve a formal notice on the first party giving two weeks' time, and it shall be incumbent on the first party to get the sleepers counted, sealed and numbered within the period of the notice issued by the second party who shall have to wait till then, but such delay shall not exceed more than two weeks after the expiry of the period fixed under the notice. If this be not done the second party shall then have the power to enter the measurement and number of sleepers in their own papers and take away the same and I, the first party, shall be entitled to get the price of the sleepers according to the entries made in the papers of the second party.

"6. Without paying in full the price of the sleepers that will be got ready every month and obtaining receipt therefor, the second party will not be entitled to cut trees or prepare sleepers in the succeeding month. In that case, on the expiry of the said succeeding month, I, the first party, shall be competent to bring the trees mentioned in the schedule given below in my direct possession and to stop the cutting of the trees, without waiting for the expiry of the term of this agreement, and if in such circumstances, I, the first party, be put to any loss through some act on the part of the second party, the second party shall be liable to pay compensation for the loss to me, the first party, and the sum of Rs. 6,000 in deposit will be forfeited."

The early part of clause 3 would appear at first blush to contain a definite contract by the contractors to cut 15,000 sleepers during each month of the nine obligatory months. Indeed, the contractors in their plaint use the words "the stipulated number of 15,000 sleepers," and again "the stipulated minimum number of sleepers." But it is suggested on behalf of the contractors either that the latter part of the clause shows that there was no such obligation, and that these figures are to be considered as directory only or hortatory only, and not compelling or that a breach of this particular covenant would not go to the root of the contract.

It is not quite clear upon which ground the High Court relied in deciding for the contractors. Perhaps the learned Judges relied upon both. The view which they seem to have taken is that the latter part of the clause supersedes the earlier, inasmuch as it substitutes a duty to prepare nine times 15,000 by the end of the year (or at least to pay for them if not prepared) for the duty in the earlier part of the clause to provide 15,000 per month.

The clause is not well drawn, but in their Lordships' view the right way to read it is that the two provisions are cumulative and not mutually exclusive. If for some reason

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which the landowner is willing to accept, a month passes without the stipulated tale of sleepers having been cut, he has, though he waives his right for that month, not lost the right to insist that by the end of the nine months the deficiency should be made up.

If then there is a positive obligation on the contractors to cut, to tender for counting, and when counted to pay for 15,000 sleepers a month, what is the landowner's remedy for a breach of this obligation? To sue for the price of 15,000 sleepers, though they have not been cut? That remedy is reserved for cases where there has been a failure in the nine months total.

Their Lordships have been invited by counsel for the respondents to put a reasonable construction on the contract, and it would be unreasonable if there were no remedy for the failure to make periodic payments. It would be reasonable if the landowner could treat such a breach as going to the root of the contract, and this seems to be provided for by clauses 3 and 6 combined.

Reliance was placed by counsel for the respondents upon the use of the word "objection." It was said that this word conveyed the idea that the contractors must positively refuse to discharge their duty before the landowner's right to cancel arose. But it had to be admitted that if the contractors refused to pay for cut and counted sleepers, at any rate after a demand for payment, that would be an "objection," which would entitle the landowner to cancel.

Under clause 3, therefore, there is a right to cancel for non-payment for the monthly tale of sleepers; but the time within which payment is to be made is not specified. This is provided for by clause 6, which follows upon the provisions as to counting contained in clause 5. Each payment is to be made in the "succeeding month." So strict is this provision that the contractors have no permission to cut in the succeeding month till the sleepers of the preceding month have been counted (an operation which need not take long) and paid for.

If in that succeeding month the sleepers of the preceding month have not been paid for, the right to cancel arises.

All this cannot be denied. Bat it is said that the contractors can avoid all their obligations and keep the contract alive for four years by merely cutting a nominal amount of sleepers every month, tendering them for counting and paying for them when counted.

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As to this the Subordinate Judge well observes :—

"The document cannot be construed as meaning that the plaintiffs might prepare one lakh and odd in the course of the year and pay for the same at the end of it. If this construction were valid, then the words in cl. 6 that the plaintiffs would not be entitled to cut trees and prepare sleepers in a succeeding month without paying for the sleepers of the previous month become meaningless."

Some observations were made by the Judges in the High Court upon the failure of the landowner to respond to the various applications which were made to him to have a count of the sleepers already prepared; but, as each of these applications admitted that the proper number of sleepers had not been prepared, there was no obligation on the landowner to have a count. The duty of the contractors was to tender the full tale of sleepers due from them, and no count could be required till they were ready with this.

No doubt the landowner must count before he requires payment ; but the first duty lies with the contractors to supply sleepers for counting.

Counsel for the respondents contended that the landowner was really claiming to treat the failure to cut as the cause of cancellation. To this the landowner's answer would be that it was immaterial to him whether the sleepers were cut or not, as long as the sleepers were paid for, but that it does not lie in the mouth of the contractors to say that they have not cut the sleepers, inasmuch as they were bound to have cut them.

The sleepers " that will be got ready every month " are the covenanted 15,000. Unless they are tendered for counting and paid for when counted the landowner can use his remedies under clause 6; and this is what he did.

Counsel for the respondents boldly said that if the contractors failed to cut, the landowner had no remedy under clause 6. This was the necessary result of his argument, but their Lordships cannot accept it.

Upon the whole their Lordships would humbly recommend His Majesty that this appeal should be allowed, and the cross-appeal dismissed, and that the judgment of the Subordinate Judge should be restored with costs here and below. The costs of a petition presented on behalf of the respondents should be costs in the appeal.

Solicitors for Homeshwar Singh and others : *Barrow, Rogers and Nevill.*

Solicitors for Jugal Kishore Marwari and another : *Morgan, Price, Gordon* and *Marley.*

A. de M. *Appeal allowed : Cross-appeal dismissed.*

PRIVY COUNCIL.

[On Appeal from the Court of the Resident at Hyderabad, Deccan.]

PRESENT:—VISCOUNT FINLAY, LORD CARSON AND LORD BLANESBURGH.

The Firm of Rai Bahadur Bansilal Abirchand ... *Appellant**

v.

Ghulam Mahbub Khan and another ... *Respondents.*

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Firm of Rai Bahadur Bansilal Abirchand *v.* Ghulam Mahbub Khan.

Civil Procedure Code (1908), *S.* 20 (*c*)—*Suit for money lent—Jurisdiction—"Court within the local limits of whose jurisdiction the cause of action wholly or in part arises"—Borrower and surety resident in Hyderabad, Deccan—Lender's place of business in Secunderabad—Repayment out of borrower's monthly salary from Nizam's Treasury.*

In 1891, the Silladar of the Nizam's Prime Minister, Hyderabad, Deccan, having borrowed Rs. 40,000 from a moneylender who carried on business at Secunderabad, executed a bond promising to repay the lender the said sum with interest at 1 1|2 per cent. in the form of monthly payments of Rs 1,000 by the Nizam's Treasury, Hyderabad. His Secretary also sent a corresponding letter to the Treasury authorising such payments by deductions from the Prime Minister's salary, and also another letter to the lender to a similar effect.

On 30th March, 1904, the Minister's Private Secretary wrote a letter to the lender saying, *inter alia,* that "in future whatever money is received out of the saving will be sent to you every month from this office"; and on the 13th April, 1904, a letter to the Secretary of the "Office of Orders from Sarkar," wherein he stated that "it is also expedient that it may be settled by you what amount out of the saving of the feeding money of horses will be sent monthly towards payment to Bansilal."

In 1911, the lender instituted, in the Court of the Civil Judge, Secunderabad, a suit against the representative of the Silladar as the principal debtor, and the representatives of the Prime Minister as surety for the recovery of the sums lent.

Held that, as the loan was contracted in Hyderabad, and there was no promise, express or implied, by either defendant to pay at Secunderabad, the cause of action arose in Hyderabad, and the Court of the Civil Judge, Secunderabad was, therefore, not the proper *forum* for proceedings to recover the money under S. 20 (*c*) of the Civil Procedure Code, 1908.

Appeal from a decree, dated 27th September, 1922, of the Resident (Lieut.-Col. S. G. Knox) at Hyderabad, reversing a decree, dated 22nd November, 1921, of the Assistant Resident (Major D. G. Wilson) and restoring a decree made by the Civil Judge of Secunderabad (K. Gindu Rao, Esq.).

The facts and arguments appear from the judgment of their Lordships. The letters of the 30th March and 13th April, 1904, are as follows:—

*P C Appeal No. 131 of 1924. 20th October, 1925.

"30th March, 1904.

"To Rai Bansilal Abirchand Bahadur.

"Subject—Debt due by Capt. Ala-ud-din Khan Sahib.

"The last decision which had been passed in this case of the Paigah, fixing the rate of interest at 12 annas and the application which you had submitted through us, expressing dissatisfaction therewith, have been submitted to Padshahzadi Begam Sahiba. Because in this case formerly it was through us that the interest was reduced, and the instalments were also remitted to you through this office, we had to press the matter before Sarkar, and the decision annulling the decision of the Majlis is herewith forwarded. The sum of Rs. 2,215 Halli, which is the saving from the food of the Silladar horses, and which has been received in this office, is herewith sent. Please acknowledge receipt. In future, whatever money is received out of the saving will be sent to you every month from this office.

(Sd.) "DOSSABHAI NOWSHERWANJI,
"*Private Secretary.*"

"13th April, 1904.

"To Devi Pershadji, Secretary of the Orders from Sarkar.

"Subject.—Debt due to Bansilal Abirchand by Capt. Ala-ud-din Khan.

"In reply to letter No. 274, dated 9th Khurdad, current year (12th April, 1904) in the above matter it is pointed out that, formerly whatever instalments were received, the receipts therefor were not given from this office, but the money used to be sent to the Sahu, and his receipt used to be transmitted. Similarly the sum of Rs. 2215 Halli was also sent to the Sahu, and his receipt is herewith forwarded; please acknowledge receipt. The account of receipt and balance will be called for from the Sahu, and, on receipt of same, will be sent on, so that the total may be ascertained, and there may be no dispute in future. It is also expedient that it may be settled by you what amount out of the saving from the feeding money will be sent monthly towards payment to the Sahu.

"2. Copy hereof is sent to Bansilal Abirchand Sahu, and he is asked for an account of receipts and balance. The same may be prepared and sent, so that it may be sent on to the Peshi Office as called for.

(Sd.) "DOSSABHAI NOWSHERWANJI,
"*Private Secretary.*"

Sir G. Lowndes, K. C., and *E. B. Raikes* for appellant.

L. de Gruyther, K. C. and *B. Dube* for respondents.

[In the course of the argument the following authorities were referred to :—*The Bengal Provident and Insurance Co., Ltd.* v. *Kamini Kumar Choudhury*, (1918) 22 C. W. N. 517; *Vasudeva Mudaliar* v. *M. A. Velappa Nadar*, (1917) 6 L. W. 717; *Jiwan Lal Deosay* v. *Oudh Commercial Bank, Ltd., Lucknow*, (1916) 34 I C 191 : 3 O L J 132.].

20th October, 1925. The Judgment of the Board was delivered by

Lord Blanesburgh.

LORD BLANESBURGH :—This is an appeal by the plaintiff from a judgment and decree, dated the 27th September, 1922, of the Court of the Resident at Hyderabad, reversing

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a decree, dated the 22nd November, 1921, of the Assistant Resident there, and restoring, albeit on other grounds, a decree made by the Civil Judge of Secunderabad, dated the 8th July, 1919.

The suit was commenced by the appellant in the Court of that Judge in September, 1911. Its purpose was to recover money lent by him so long ago as 1891 to the grandfather of the first respondent with repayment guaranteed, so it was alleged by the late Sir Asnam Jah, Prime Minister of Hyderabad, whose estate is represented in the suit by his son, the second respondent. The borrower, the alleged surety, and their respective representatives were, or are, all resident in Hyderabad, the capital of the Nizam's dominions. The appellant, however, has a place of business at Secunderabad, a neighbouring British Cantonment, and asserting that the loans were both made and repayable there, he claimed that his suit in respect of them was cognizable by the local British Court.

But this was not the appellant's only reason for invoking that jurisdiction—if he could successfully do so. In the Courts of the Nizam his demands had long since been barred by lapse of time. In the British Court, however, he claimed to be entitled to escape from the operation of the Indian Limitation Act—an Act otherwise entirely applicable to the case—on the ground that the residence of the defendants in Hyderabad was a "foreign" residence which took his claim against them outside the statute although their residence was in fact only six miles away.

In the Courts below many matters of fact were canvassed. Most of these, concluded by concurrent findings, were before their Lordships treated as settled, and the arguments were addressed to one question only, viz., was the Court of the Civil Judge of Secunderabad entitled to entertain the suit at all.

That learned Judge had held that he had jurisdiction in the matter, but he dismissed the suit, holding on the view taken by him of the facts, that the appellant had been repaid all that was due to him.

The appellant appealed to the Assistant Resident at Hyderabad. His appeal was resisted only by the second respondent, and he, it is stated, did not there raise again his objection to the jurisdiction of the Court taken before the Trial Judge, and certain at least it is that the learned Assistant Resident made no reference to the point in his judgment, by

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which the claim of the appellant was in effect allowed in full. The second respondent then appealed to the Resident, and he, taking up the consideration of the question afresh, held that the Civil Judge of Secunderabad had no jurisdiction in the matter. On that ground he allowed the appeal and dismissed the plaintiff's suit, expressing, however, at the same time his concurrence with the findings of fact of the Assistant Resident where these were at variance with the findings of the Trial Judge. The plaintiff again appeals.

At the outset their Lordships would express their entire concurrence with the learned Resident in his observations upon the importance of this question of jurisdiction in such a case as the present. The respondents are both of them subjects of the Nizam, from whose cession, as the learned Resident points out, the jurisdiction of the Secunderabad Court practically proceeds. In these circumstances, and especially where, as here, the liability or non-liability of such defendants may actually depend upon it, the question of jurisdiction becomes of first importance, different in character from such a question when it arises merely as between one Court and another in British India. And, while their Lordships would not here have upheld, even if it had been pressed, the contention raised in his printed case by the appellant that this question of jurisdiction decided by the Trial Judge in his favour, and not re-opened before the Assistant Resident, must now be treated as concluded against the respondents, they are gratified to record that that contention was not persisted in before the Board. Indeed, as they have already said, the arguments before them were confined to its discussion.

Its determination turns solely upon the question whether, in this case, within the meaning of S. 20 (*c*) of the Code of Civil Procedure, the cause of action wholly or in part arose within the local limits of the Civil Judge of Secunderabad. The facts upon which the answer depends lie in a small compass.

In 1891 Muhammad Ala-ud-din Khan, deceased, grandfather of the first respondent, was Silladar of Sir Asnam Jah Bahadur, Prime Minister of the Nizam. Having agreed to purchase 100 horses to form part of the bodyguard of the Prime Minister Ala-ud-din borrowed from the plaintiff Rs. 40,000 to pay for them, and arranged with the Paigah of the Minister for repayment of the loan with interest by monthly instalments by means of deductions from his salary in the manner which is thus described in a communication addressed on the 29th

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July, 1891, by the Secretary of the Minister to the Pay Office of the Paigah :—

> "The said Silladar for purchasing the horses has borrowed from Rai Bahadur Bansilal Abirchand the sum of Rs 40,000 with interest at 1 1/2 per cent., and has assigned the liability to pay the principal and interest by monthly instalments of Rs. 1,000 upon this Secretariat. Wherefore you had better pay to the person who may bring the chitti of the said sowcar the sum of Rs. 1,000 every month."

The promise made to the plaintiff, the fulfilment of which was thus directed, was contained in a note which had been addressed by the same Secretary to the plaintiff on 21st July, 1891, in which it is stated that "every month at the time of distribution of pay of the force, after taking receipt of Khan Sahib a sum of Rs. 1,000 will be paid from the Ilaqa to the plaintiff's Ilaqadar, who may bring chitti signed by the plaintiff without any objection or prevention from the Sarkari Treasury until the principal and interest are fully liquidated."

In these terms was the promise of the Treasury made, and their Lordships are willing to accept without deciding that, as alleged by the plaintiff, they constituted a contract of suretyship, Ala-ud-din being the principal debtor.

His own obligation as such is expressed in a bond of the 25th July, 1891, in which he promises the plaintiff :—

> "That in repayment of the said sum [of Rs. 40,000] and until the principal and interest is repaid one instalment of a sum of Rs. 1,000 will be reaching you every month from out of the distribution of the pay of the force. Accordingly I have also caused a guarantee to be made for the said sum of money by means of a *Rubkar*, dated the 21st July, 1891, from the office of the Secretary of Revenue. The instalment of Rs. 1,000 which has been agreed will reach you directly from the Treasury irrespective of the fact whether there is any saving from out of the salary of the horses or not. . . . There will be no failure in the instalments reaching you. If for any reason perchance one instalment is defaulted the said sowcar will have the power to sell immediately the horses by auction and recover and pay himself the total amount."

A further advance of Rs. 5,000 was made by the plaintiff on 9th August, 1891, and a final advance of Rs. 7,628 on the 6th June, 1894. These for present purposes may be treated as having been made on the same terms.

As to their meaning and effect their Lordships are not in doubt. The Treasury or surety repayment is to be made to the plaintiff or his representative at the office of the Treasury at Hyderabad, and the instalments, which in the principal debtor's bond are described as "reaching" the plaintiff are the very instalments of which payment is so to be made. There

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is no promise either by the principal debtor or the surety to make any payment at Secunderabad, and so far as the principal debtor is concerned the bond above abstracted is the only promise on his part which is forthcoming. It is quite true that on failure of any instalment there is doubtless an implied promise by him to repay the loan. But there is no implied promise to repay it at Secunderabad. Even by British law the duty of a debtor to find and pay his creditor is only imposed upon him when the creditor is within the realm. And the plaintiff has not contended that if there be any such duty at all imposed by Indian law upon a debtor it extends in this respect further than in England. Accordingly so far as the principal debtor is concerned there is no obligation upon him, either express or implied, to make any payment to the plaintiff at Secunderabad.

Nor so far is there any such obligation assumed by the surety.

But it is contended, and the Trial Judge took the view, that such an obligation is to be found in two documents written in the year 1904, one on the 30th March, addressed by the Treasury Secretary to the appellant, and the other, on the 13th April, addressed by one department of the Prime Minister's establishment to another, a copy being forwarded to the appellant.

Their Lordships do not consider it necessary to discuss these documents in detail. They are satisfied that they were never intended to alter the contractual obligations of the surety. At most they indicated a substituted arrangement to be continued only so long as was convenient ; there was neither intention to alter nor any consideration present for the alteration of the obligations as they then existed.

It follows that in their Lordships' judgment no part of the obligations either of the principal debtor or of the surety was to be discharged at Secunderabad. And no obligation was assumed there. No part of the plaintiff's cause of action accordingly arose within the local limits of the Court of the Trial Judge. He had no jurisdiction to entertain the suit, and in their Lordships' judgment the decree of the learned Resident was quite right.

Their Lordships accordingly will humbly advise His Majesty that this appeal therefrom be dismissed with costs.

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Solicitors for appellant : *T. L. Wilson and Co.*

Solicitors for respondents : *Lattey and Hart.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT :—LORD BLANESBURGH, LORD DARLING AND SIR JOHN EDGE.

Ram Protap Chamria ... *Appellant*

v.

Durga Prosad Chamria and others ... *Respondents.*

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Ram Protap Chamria v. Durga Prosad Chamria.

Partnership business carried on by Hindu family—Suit for dissolution—Other matters in dispute between members of family—Agreement to refer all matters in dispute to arbitration—Arbitration Act, 1899—*Civil Procedure Code,* 1908, *Second Schedule—Order in suit referring matters in difference therein to arbitration—Award dealing with all matters in dispute in the family—Award void for exceeding the order.*

A business was carried on in partnership between an uncle and his two nephews who belonged to a family within which there eventually developed many differences and disputes apart from the partnership. Upon the death of the uncle, one of the nephews instituted a suit against the other members of the family (but not his uncle's widow) for dissolution of the partnership, accounts, and a Receiver. After the plaint had been filed, the adult members of the family, including the uncle's widow, executed an agreement, appointing arbitrators "for the settlement of all matters in dispute amongst them" and agreeing to abide by their decision in respect of the disputes and "in respect of the proceedings in Court with regard to this matter before this day". The plaintiff's nephew then petitioned the Court in the suit for an order sanctioning the arbitration in pursuance of the agreement under the Second Schedule, Civil Procedure Code, 1908. The Court, however, made an order referring to arbitrators only the matters in question in the suit. The award issued by the arbitrators purported to embrace and adjudicate upon matters far relative to the partnership, as well as all other matters in dispute within the family.

Held, that such award exceeded the limits of the order of Court, and was void under the Civil Procedure Code, 1908, Sch. II.

Appeal from an order, dated 19th July, 1923, of the High Court, Appellate Jurisdiction (Mukerjee and Rankin, JJ.) affirming an order of the same Court, Original Civil Jurisdiction (Greaves, J.), dated 24th July, 1922, upon an application to set aside an award of arbitrators.*

The facts appear from the judgment of their Lordships.

L. de Gruyther, K. C. and *W. Wallach* for appellant :—The document, dated 11th May, 1922, appointing arbitrators

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*P C Appeal No. 121 of 1924. 20th October, 1925.

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for settlement of all disputes between the parties who executed it was legally valid under the Arbitration Act (IX of 1899), and the award is valid as the arbitrators acted within the scope of the submission and within their jurisdiction. *Darlington Wagon Co.* v. *Harding* (1); *Mahomed Nawaz Khan* v. *Alam Khan* (2); *Bhajahari* v. *Behary Lal* (3). Even if part of the award is excessive, the Court may eliminate that part and confirm the rest under S. 12 of the Second Schedule to the Civil Procedure Code, 1908. *Johnstone* v. *Cheape* (4); *Caledonian Railway Co.* v. *Lockhart* (5); *Buta* v. *The Municipal Committee, Lahore* (6); *Amir Begum* v. *Badr-ud-din* (7); and *Hemanta Kumari Debi* v. *Midnapore Zemindari Company* (8). In any event the High Court should have held that all parties had waived any objection to the arbitrators deciding matters which were outside the scope of the suit.

W. H. Upjohn, K. C., Sir George Lowndes, K. C. and *K. V. L. Narasimham* for respondents :—The award is totally invalid as (*a*) it dealt with matters outside the scope of the suit; (*b*) relative to matters within the scope of the suit, the arbitrators exceeded the terms of their authority; and (*c*) it affected the rights of Annardeyi, the uncle's widow, who was not joined as a party to the suit. Further, the arbitration was conducted in a manner not contemplated by law, inasmuch as it was a simultaneous and joint arbitration under the agreement of the 11th May, 1922, and upon the order of reference of the Court, in respect of matters within and without the scope of the suit and between persons some parties and others strangers to the suit. And it was impossible for the Court to pronounce judgment or pass a decree upon the award as framed. [They referred to *Ghulam Jilani* v. *Muhammad Hussan* (9), *Baillie* v. *Edinburgh Oil Co.* (10) and *Hari Singh* v. *Kankinarah Co.* (11).]

20th October, 1925. The Judgment of the Board was delivered by

Lord Blanesburgh

LORD BLANESBURGH :—This appeal is from an order of the High Court of Judicature at Fort William in Bengal, exercising appellate jurisdiction and in effect affirming an order

1. L R (1891) 1 Q B 245.
2. L R (1891) 18 I A 73 : I L R 18 C 414 (PC).
3. (1906) I L R 33 C 881.
4. (1817) 5 Dow 247.
5. (1860) 3 Lockhart 808.
6. L R (1902) 29 I A 168.
7. (1914) I L R 36 A 336 : 27 M L J 181 (P C).
8. L R (1919) 46 I A 240 : 37 M L J 525 (P C).
9. L R (1901) 29 I A 51 : 12 M L J 77 (P C).
10. (1835) 3 C & F 659.
11. (1920) 34 C L J 39.

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made by Mr. Justice Greaves, sitting in the exercise of the ordinary original civil jurisdiction of the Court. Both were orders propounded in a suit for the dissolution of a partnership, and their result was to set aside an award of arbitrators so far as that award affected to deal with matters in question in the suit. The appellant upholds the award and asks that the orders setting it aside be discharged.

The circumstances are somewhat involved and, in detail, elaborate. It will be possible, however, as their Lordships hope, to state the facts in a summary form without endangering such accuracy as is requisite for the purposes of their judgment.

The disputants are descendants of one Nandram Chamria, and their disputes are to a large extent, although not altogether, traceable to questions concerning the division of the estate of one of his sons—Hardatroy Chamria—whose position in the family with his relationship to the parties before the Board appears in the following pedigree, taken from the judgment of Mr. Justice Mookerjee in the Appeal Court.

Nandram Chamria

- Gorakhram
  - Ram Protap (Plaintiff)
  - Amlokchand m. Surji (adopts Keshabdeo)
- Hardatroy Chamria m. Annardeyi
  - Durga Prosad
    - Keshabdeo
  - Radhakissen
  - Motilal

The suit, No. 120 of 1922, related to a business of brokers and bankers carried on under the style of Hardatroy Chamria and Company. The business originally had been started by Hardatroy alone. Some years later he took into it first as an assistant, then as a partner, his nephew, the plaintiff and present appellant, Ram Protab Chamria. The appellant's share as a partner was, in its origin, two annas; subsequently, it became one of five annas. Later still, the appellant's brother, Amlokchand, was admitted a partner with a two annas' share. He died, however, in 1911, and after his death the business was carried on by Hardatroy and the appellant together, Hardatroy being treated as possessed of an eleven annas' share and the appellant of the remaining share of five annas. By an indenture, dated the 1st October, 1916, and made between Hardatroy and the appellant, it was agreed that this partnership should continue for 20 years. There

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is no further reference in the appellant's plaint to the two annas' share which belonged to Amlokchand at the time of his death. The appellant appears to treat it as merged in the shares of himself and Hardatroy. This position, however, is not accepted by the representative of Amlokchand's estate, as will later appear.

Amlokchand left no issue but he was survived by his wife, the respondent, Musammat Surji, and on her expressing a desire to adopt as a son to her deceased husband, Hardatroy's youngest son Motilal, Hardatroy, so it was alleged by the appellant, agreed, with the appellant's consent, to admit Motilal to the firm setting aside for his benefit a two annas' share out of his own share of eleven annas. This arrangement, however, if it became effective at all, was almost immediately superseded by an agreement in writing, dated the 16th November, 1916, to which Hardatroy, his three sons, the appellant and Musammat Surji were privy or parties and under which in effect Hardatroy retired from the firm and it was agreed that the business should, as from 1st January, 1917, belong in stated shares to the appellant, to the son to be taken in adoption by Musammat Surji, and to the three sons of Hardatroy *viz.*, Durga Prosad, Radhakissen and Motilal—with a variation in interest as between these three, if Motilal proved to be the son to be taken in adoption to Amlokchand as contemplated.

By an agreement of even date entered into by Musammat Annardeyi, Hardatroy's wife, and his three sons, but to which the appellant was not a party, an arrangement was embodied with reference to the division of his property on the death of Hardatroy, an event then apparently regarded as imminent. The property dealt with by this agreement in terms extends to Hardatroy's interest in the partnership, although that interest appears to have been disposed of, and differently, by the agreement already set forth. It is stated in this second agreement that it had become necessary in order to settle the disputes which had arisen regarding the rights of Durga Prosad who, unlike each of his younger brothers, was an adopted son and not a natural son of Hardatroy.

In the following month Hardatroy died. The appellant's case, as set forth in his plaint, then was that the business, since the date when the first agreement of the 16th November, 1916, became operative, had been carried on upon the basis of that agreement but that Musammat Surji had not adopted

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Motilal. On the contrary, she had put forward Keshabdeo, a son of Durga Prosad, as the son whom she had adopted to her late husband. The appellant disputed both the factum and the validity of such adoption, further alleging that Durga Prosad had drawn out of the firm about twenty-one lacs without the knowledge of any of the parties, that he had taken forcible possession and refused inspection of the partnership books, that he was making unauthorised entries therein to suit his own purposes and that he had been guilty of gross misconduct in the affairs of the partnership and towards the partners. Accordingly, the appellant claimed dissolution of the partnership, accounts and a Receiver. He cited as defendants to the suit, Durga Prosad, Radhakissen and Motilal, Musammat Surji and Keshabdeo. It will be noted that Annardeyi, Hardatroy's widow, is not a party to the proceedings.

The plaint was filed on 12th January, 1922. No written statements have ever been put in, but it may, their Lordships think, be fairly gathered from his plaint that the only questions which the appellant, at all events, desired to raise in the suit were, first : whether the adoption of the infant defendant Keshabdeo had ever taken place ; whether it was valid if it had ; and who, on either view, were the persons interested and in what shares in the partnership, which was treated as one constituted by the agreement of the 16th November, 1916 ; and secondly : whether the allegations made by the appellant against Durga Prosad were, if established, sufficient to entitle the appellant to the decree of dissolution which he sought.

But these did not comprise all the matters of difference then existent in the family of Nandram Chamria. First of all, in the appellant's own immediate branch of it, there was apparently a serious dispute between him and Musammat Surji upon the question whether the appellant and Amlokchand were joint or separate in estate ; there was another as to the rights of each brother in the ancestral or self-acquired property of their father Gorakhram ; there was a third as to the claim of Musammat Surji to certain company shares standing in the name of the appellant. Next there was a question with Amlokchand's representatives in which not only the appellant but the estate of Hardatroy was concerned : namely, whether Amlokchand's estate was entitled to his two annas or some other share in the partnership as carried on prior to the 1st January, 1917, and at whose expense. In Hardatroy's branch of the family again there were further serious

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questions, as to the validity of the second agreement of the 16th November, 1916, as to the extent of his widow Annardeyi's property, and as to the rights and interests in the property of Hardatroy, both of his widow and his three sons respectively.

The most striking feature of this second and third sets of disputes in relation to the question now before the Board is the interest in them of Annardeyi who, as, has been pointed out, was not a party to the suit at all. Nor can it fairly be gathered from its terms, as their Lordships think, that any of these questions are either raised or foreshadowed in the appellant's plaint. It may well be that some of them would have been mooted in one or other of the written statements of the defendants when put in. But this must still remain in the region of conjecture. It suffices to say that none of them have so far become matters in question in the suit.

After the plaint was filed the adult members of the family appear to have come to the conclusion that all the questions in difference amongst them should be referred to arbitration, and on the 11th May, 1922, Annardeyi, Ram Protap, Durga Prosad, Radhakissen, Motilal, together with Keshabdeo, by Musammat Surji on his behalf, executed a document addressed to Rai Sew Prosadji Toolsan Bahadur, Rai Narang Raiji Khaitan Bahadur, Banshidharji Khaitan, Jugal Kissoreji Birla and Sew Prosadji Gorodiya, appointing them arbitrators "for the settlement of all matters in dispute amongst ourselves" agreeing to accept whatever the arbitrators might decide with reference to the said disputes and in "respect of the proceedings taken in Court with regard to this matter, before this day" agreeing that the proper parties would make in accordance with the directions of the arbitrators such applications as the arbitrators might think necessary.

The terms in which this document is couched suggest very cogently to their Lordships' minds that it was so far, at all events, the intention of all the parties to it that the proceedings in the suit should become merely ancillary to the arbitration, if indeed they were not thereby to be entirely superseded. And if the application made to the Court had been that all proceedings in the suit should be stayed and an order in these terms had been made thereon, that doubtless would have been the result. But the application actually made to the Court was not of that nature. It took the form of a petition presented

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in the suit by the appellant purporting to act with the approval of all parties and referring to the agreement of the 11th May, 1922, as "an agreement to refer all matters in dispute between them"; and it prayed, in effect, that the matters alluded to in the agreement should all be remitted to arbitration in accordance with its terms.

But whatever may have then been the desire of the parties, including it may well be even Annardeyi, and whatever may have been the belief of the arbitrators as to the terms of the order actually made, the Court had on that application no power to refer to arbitration any questions between the parties to the suit other than those in question in the suit or any questions in which was concerned any one not a party to the suit. Nor did it exceed its powers in this matter for by its order made on the 23rd May, 1922, although not actually drawn up until the following month, what the Court did was to refer all matters in difference *in the suit between the parties to the suit* to the final decision of the arbitrators named in the agreement of the 11th May, 1922, in terms of that agreement, with consequential directions applicable to such a reference, the minor defendant, Keshabdeo, being given liberty to appear in the proceedings through his attorney.

In their Lordships' judgment the decision of this appeal really turns upon the effect of that order properly interpreted. It was an order made in pursuance of paras. 1 and 2 of the Second Schedule to the Code of Civil Procedure, and in the exercise of a power thereby given to the Court to refer to arbitration matters in difference in a suit defined by itself in the order of reference. It is incumbent upon arbitrators acting under such an order strictly to comply with its terms. The Court does not thereby part with its duty to supervise the proceedings of the arbitrators acting under the order. An award made otherwise than in accordance with the authority by the order conferred upon them is, their Lordships cannot doubt, an award which is "otherwise invalid" and which may accordingly be set aside by the Court under para. 15 of the same schedule.

The difficulties in this case have all arisen from the fact that the arbitrators (misled it may well be by the attitude of the parties at the time of their appointment) have not fully appreciated the importance of the fact that some of the questions consensually submitted to them were already the subject

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matter of a pending suit to which one of the persons appointing them was not even a party.

The arbitrators did not wait for the Court's formal order on the application of the 23rd May. They proceeded at once with the arbitration, and on the 27th May, 1922, they published their award. That award not only dealt with all the disputes above detailed but it is clear on its face that the arbitrators in no way discriminated between those disputes which were at issue in the suit and those which were not. The order of the 23rd May is recited as one :—

"By which all matters in dispute between the parties were referred to our arbitration provided that the arbitration is to be in terms of the said agreement, dated the 11th May, 1922, and that the attorney for the guardian *ad litem* of the infant defendant be allowed to represent him."

And it is clear to their Lordships from the terms of the award itself—and there is extrinsic evidence to the same effect —that in reaching their conclusions the arbitrators took a comprehensive view of the family situation and made an award which doubtless they regarded as just on the whole and as a whole, but which probably they would not, in any of its parts, have themselves made precisely in the same terms, if the dispute thereby dealt with had alone or separately been submitted to them for adjudication.

To illustrate by a striking example what their Lordships mean, they would point to the shares to be taken in the new partnership provided for by the award. These precise shares have apparently no counterpart in the shares taken in the dissolved partnership according to either of the agreements with reference thereto which the arbitrators themselves find to be binding on the parties.

The award, an elaborate document, has been carefully analysed by the learned Judges in the Courts in India. It is not necessary that their Lordships should again go through it in detail. It finds both of the agreements of the 16th November, 1916, to be binding : it declares that the appellant and Amlokchand were not joint but separate in estate and —a finding which vitally concerns the estate of Hardatroy— that they are respectively entitled to a five annas' and a two annas' share in the partnership business up to the 31st December, 1916 : that the adoption of Keshabdeo was valid : while with special reference to the partnership business, the award declares that the partnership is to be dissolved with effect from the 30th June, 1922 : it provides for a new firm being con-

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stituted as from the 1st July, 1922: it prescribes the shares in which the old partners are to be interested therein, and with reference to that partnership declares that in case any of the partners do not agree to the prescribed conditions he shall inform the firm in writing, whereupon his capital will be returned to him and his connection with the firm shall cease and his share be taken up equally by the remaining partners. This last is the only provision in the award for the satisfaction of the claims against the property and assets of the dissolved partnership of any partner who does not choose to come into the new partnership. The award contains elaborate further provisions for the adjustment of the other disputes above referred to.

In their Lordships' judgment such an award is in no true sense one made in obedience to the order of the 23rd May, 1922. While it would not be easy to segregate the findings with reference to the matters in question in the suit from those not so in question—the findings in which Annardeyi was interested from those in which she was not—it is, their Lordships think, impossible to uphold an award in relation to a suit the conclusions of which were plainly coloured, if not dictated, by the view taken by the arbitrators of other questions between the parties or some of them to which the suit had no reference.

Taking even a narrower view of the matter the award so far as it purported to constitute a new partnership, giving to a party who refused to come into it only rights which were far below those to which as a member of a dissolved partnership he was entitled was not in their Lordships' judgment an award in any way contemplated or authorised by the order of reference.

To the award when published Musammat Surji, as guardian *ad litem* of Keshabdeo, took strong exception, and on the 5th July, 1922, gave notice to the other parties to the suit of an application by her for an order that the award should be set aside or modified or corrected by expunging therefrom all passages relating to matters that were not in question in the suit. On that application Mr. Justice Greaves by order, dated the 24th July, 1922, set aside the award in so far as it purported to deal with matters referred to in the suit. His order, as above stated, was affirmed by the Appellate Court by an order, dated the 19th of July, 1923. Mr. Justice Greaves based his decision primarily upon the view that the

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provisions of the award relating to the new partnership were quite unauthorised and invalid. The Appellate Court based their decision upon the ground that it was really impossible according to the Statute Law of India that one and the same arbitration should be held as Rankin, J. expresses it :—

"'As to matters within the jurisdiction of the Court and matters without the jurisdiction of the Court; between the parties to the suit and between them and other persons; under the Code provided by the Indian Arbitration Act and under the Code provided by the Second Schedule; under the superintendence and control of the Judge who has seizin of the suit and of the Judge disposing of business under the Indian Arbitration Act; partly upon an order of reference and partly under an agreement."

Their Lordships desire to reserve their opinion upon the question whether there may not be exceptions to that comprehensive statement.

They are satisfied, however, for the reasons they have given, that the order actually made by one Court and affirmed by the other was, in this case, the proper order to be made.

They will accordingly humbly advise His Majesty that this appeal therefrom should be dismissed and with costs.

Solicitors for appellant : *W. W. Box and Co.*

Solicitor for respondents : *H. S. L. Polak.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL.

[On Appeal from the Chief Court of Lower Burma.]

PRESENT :—LORD PHILLIMORE, LORD BLANESBURGH AND SIR JOHN EDGE.

D. R. K. Saklat and others ... *Appellants**

v.

Bella ... *Respondent.*

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Trusts of Parsi Fire Temple—Admission to sacred precincts of child of non-Parsi father—Conversion of non-racial Parsi to Zoroastrian faith—Suit by members of Parsi community to exclude convert from use of temple—Trespass—Position of trustees.

In 1859 the Government granted a piece of land at Rangoon to two Parsi trustees upon trust to maintain it "as a cemetery and to the free use of persons of the Parsi denomination," and power was reserved to the Government to appoint new trustees, and to revoke the trust in case the land was applied to other uses. In 1868 another similar grant was made "upon trust to build and maintain upon the land a temple for the use of the Parsi population," and power was again reserved to the Government to nominate new trustees, and

*P C Appeal No. 57 of 1924. 22nd October, 1925.

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to revoke the grant if the temple was not erected within a year. Both grants were renewed in 1882, and schemes were subsequently drawn up for the management of the temple and burial-ground, that for the latter providing that it "was to be used for burying persons who shall at his or her death be actually professing the Zoroastrian religion and no other"; and that "no one shall be taken to be actually professing the Zoroastrian religion who has not been duly invested with the Sudra and Kusti, in accordance with the rites prescribed by that religion".

In 1915 a person, whose father was a Goanese Christian, and mother a Parsi, was converted to or initiated into the Zoroastrian religion, and began to attend the temple, and, within the sacred precincts thereof, to face the sacred fire and to perform the ceremonies in common with other worshippers.

In an action instituted by certain members of the Parsi community against the convert for an injunction restraining her from using the temple or attending its ceremonies, *held*, (*a*) that only those are entitled, as of right to the benefits of the temple, and to use, attend or participate in the religious ceremonies performed there, who are professing members of the Parsi community, *i. e.*, *racial Parsis* or persons deemed after a long lapse of ages to be racial Parsis, and consequently mere converts to the Zoroastrian religion were not such racial Parsis, and not within the contemplation of the donors or founders of the aforesaid trusts, and had therefore no right of, and may be excluded or expelled by the trustees as a trespasser from, entering the temple; but (*b*) this conferred no right upon the beneficiaries of the trust, apart from and without the intervention of the trustees, of directly suing persons outside the foundation who seek to benefit by it; (*c*) where the subject-matter of a public or charitable trust is the rendering of some convenience or service of such a nature that it will not hurt the lawful recipients if others outside the foundation share with them, the trustees are not bound to exclude such latter persons. *D. M. Petit* v. *J. Jijibhai,* I L R 33 Bom 509 and *Rex* v. *Grundon : Ex parte Davison,* Coop 319 referred to.

If what is prayed for is not a general declaration as to the persons who are objects of the trust, or a construction of the scheme, or an order upon the trustees, the proper plaintiffs in the action are not the beneficiaries of the trusts of the temple, unless it is established that the juxtaposition of the two sets of persons in temple is (for example, among the different castes of Hindus) so repugnant to their habits of mind that the entrance of one set therein entails the departure of the other, so that it is, as it were, trespass to the person, and not trespass into the premises of the temple. *Anandrav B. Phadke* v. *Shankar D. Charya,* I L R 7 Bom 323 referred to.

Quaere :—Whether the use of the Fire Temple by a person duly admitted to the Zoroastrian religion can hurt the feelings of the other Zoroastrians or cause a substantial interference with the devotions of the worshippers, or a desecration of the Temple so as to ground an action directly against the intruder.

Appeal from a decree of the Chief Court, Lower Burma, Appellate Side (Robinson and MacGregor, JJ.), dated the 28th July, 1920, dismissing the appeal of the plaintiffs from the decree of the said Court in its Original Jurisdiction (Young, J.), dated the 23rd April, 1918.

The facts appear from the judgment of their Lordships.

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A. M. Dunne, K. C., Sir George Lowndes, K. C. and *E. B. Raikes* for appellants.

W. H. Upjohn, K. C. and *W. Draper* for respondent.

22nd October, 1925. The Judgment of the Board was delivered by

Lord Phillimore.

LORD PHILLIMORE :—The circumstances of this case are as follows :—

Some time in 1899 a Goanese Christian named Jones with his wife arrived in Rangoon. They were in humble circumstances, and the wife applied for assistance to a Parsi of good position at Rangoon, Bomanji Cowasji, stating that she too was a Parsi. He befriended her till he went to England in 1900 and then asked his brother Sapurji Cowasji to look after her and the child, to which she had just given birth, the respondent Bella. The father died and when her mother died shortly afterwards Sapurji, who was a defendant in this suit, but died pending the appeal, took Bella into his own house, and he and his wife treated her as their own child.

When Bella was nearly 14, it was desired that the initiation ceremony into the Zoroastrian religion called Navjot should be performed for her, but the local Head Priest at Rangoon refused, chiefly because—as it appears from his evidence—he thought it would be unpopular with the Parsi community. Advantage was then taken of the temporary presence of some other priest, who performed the ceremony ; and after that invitations were sent by the Head Priest to Bella to come with Sapurji and his wife to the Temple on festival days. Three such invitations were sent, the High Priest said, with the expectation that they would not be accepted ; but on the third occasion, being 21st March, 1915, Sapurji brought her and put her within the sacred precincts facing the sacred fire, and in such a position that she went through all the ceremonies like other worshippers.

This proceeding gave great offence to a number of members of the Parsi community in Rangoon, and on the 31st March, this suit was brought by three members of the Parsi community, who stated that they brought it not only on their own behalf but on behalf of a large number of members of the Parsi community at Rangoon, against Bella and against Sapurji, stating that the Temple was held on trust for the free and unrestricted use of the Parsi inhabitants in Rangoon professing the Zoroastrian faith, further stating that it was alleged that

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the mother of Bella was a Parsi, and that Bella had been validly converted or initiated into the Zoroastrian religion, but denying that this was so or indeed could be so, and averring that the defendants had by their acts "not only wounded the religious feelings entertained by religiously inclined Parsis, but also caused the desecration of the said sacred Temple."

In another paragraph of the plaint, they stated that only members of the Parsi community professing the Zoroastrian religion were entitled to the use of the Temple, to the access of the sacred precincts and to attend, witness or take part in any religious ceremonies held therein, and that it was never the intention of the Parsi community that the children of non-Parsi fathers should be allowed the use of the Temple. They further said that even assuming that Bella could be duly admitted into the Zoroastrian religion, and assuming that her mother was a Parsi, even then she could not be considered a Parsi or a member of the Parsi population. They prayed for a declaration that Bella was not entitled to use the temple or to attend or to participate in any of the religious ceremonies performed therein and for injunctions to restrain her from entering the Temple and Sapurji from taking her there.

Sapurji, in his own name and as guardian for Bella, put in their written statement. In this it was contended that the plaint disclosed no cause of action, that the defendant Bella was entitled to attend the Temple and the ceremonies and caused no desecration by her presence; and it was stated that her mother was a Parsi, that she had been brought up from early infancy as a Parsi and in the Zoroastrian faith, and that she came within the terms of the trust of the Temple.

The following issues were then settled :—

"1. Whether the plaint discloses any cause of action ?

"2. Whether this suit is maintainable ?

"3. Who are entitled to the benefit of the Fire Temple Trust ?

"4. Is the first defendant the daughter of a Parsi mother?

"5. Is it possible for the first defendant, being a daughter of a non-Parsi father to be initiated (*a*) into the Zoroastrian Religion, and (*b*) into the Parsi community ?"

"6. If it was possible, whether the ceremonies adopted for the purpose were defective (the second defendant to give particulars of the ceremonies performed at the initiation of the first defendant within one week, and the plaintiffs to state within one week thereafter whether, and if so, in what respects they contend that these ceremonies were inefficacious) :

and the case was set down for a preliminary hearing on the first and second issues.

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The Judge decided these points in favour of the plaintiffs; and thereupon some oral evidence was taken before the Judge at Rangoon, and a mass of evidence covering 664 pages of the record was taken on commission at Bombay.

It appears that this was not the first occasion in modern times in which the question of the admissibility of a person who was not a racial Parsi, but who had become a convert to the Zoroastrian religion, to participate in the religious services and enter the temples of the Parsis had arisen.

In 1903 a French woman had declared that she had become a convert to the Zoroastrian religion and had married a Parsi gentleman of position at Bombay. Her claim to participate in religious worship had given rise to much excitement in the Parsi community, and seven Parsis, one of whom was the French woman's husband, had brought a suit in the High Court of Bombay against the trustees of the Parsi endowments, first making a general case of some misfeasances requiring the intervention of the Court, and secondly, claiming a declaration that the trust deeds ought to be construed as admitting to their benefits any person professing the Zoroastrian religion whether a racial Parsi or not.

After a prolonged litigation, this suit, except in so far as it prayed for a correction of the general misfeasances, was dismissed ; and the Judges, for reasons which will have to be more minutely entered into, held that the various endowments were limited to the use of people who as well as being Zoroastrian were also racial Parsis. But the controversy had not been forgotten, and its echoes are to be heard in the evidence given on commission in the present case.

Young J., in the preliminary judgment given in the present case, held that the plaintiffs could not sue for trespass on land or in the Temple, but that they might have a third cause of action which he described as an interference with their right to exclusive worship. He thought that they had sufficiently alleged this right and its infringement, that the right was one which had been often upheld by the Courts, and that the suit could be brought without joining the trustee or without obtaining the consent of the Advocate-General. When he came to his later decision upon the whole case, he described the injury as "an injury to the plaintiffs' individual right to worship undisturbed by the intrusion of a person not belonging to their faith," and applying his mind to the fifth and sixth issues, he held that Bella could be

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initiated into the Zoroastrian religion and into the Parsi community; that the ceremonies adopted for the purpose were sufficient, and that therefore there was no intrusion of a person not belonging to the plaintiffs' faith, and it became immaterial to decide issues three and four. Accordingly he dismissed the suit.

When the matter came before the Chief Court, on appeal, the Judges, though apparently they heard one continuous argument, gave two judgments : the first in respect of the preliminary issues. In this they confirmed the actual decision of Young J. but enlarged the plaintiffs' cause of action, saying that they might treat it as an injury to themselves, that Bella, even though she were a Zoroastrian, yet not being a Parsi, came to the Temple worship.

This made it necessary for the Judges in the Chief Court to determine the third issue, *viz.*, who are entitled to the benefits of the Fire Temple Trust ; and they held that it was a trust for a religion and not for a race. They then held in agreement with Young J., that Bella could be and was converted or initiated into the Zoroastrian religion, and therefore they concurred with him in dismissing the suit.

The Judges in the Chief Court took the view that the fourth issue might also have been decided in favour of Bella, *i. e.*, that her mother was a Parsi, but that this fact was unimportant, except as leading up to her conversion or initiation. Their Lordships agree with this. In their view it is settled that as regards the racial claim, maternity is of no importance.

The appeal to their Lordships' Board has raised among other questions the actuality and validity of Bella's conversion and initiation ; but on this point their Lordships see no reason for differing from the judgment of the Chief Court.

In the great controversy in the Bombay case, *Dinsha Manekji Petit* v. *Jamsetji Jijibhai* (1), the two learned Judges (one of whom was himself a Parsi), came to the following conclusions thus expressed by the Parsi Judge, Davar J. :—

"1. That the Zoroastrian religion not only permits but enjoins the conversion of a person born in another religion and of non-Zoroastrian parents.

"2. That, although such conversion was permissible, the Zoroastrians, ever since their advent into India 1200 years ago, have never attempted to convert any one into their religion.

"3. That there is not a single instance proved before the Court of a person born of both non-Zoroastrian parents ever having been admitted into the Zoroastrian religion professed by the Parsis in India."

1. (1908) I L R 33 B 509.

It is true that as regards the quantum of the necessary ceremonial on initiation, Davar J. expressed an opinion that a piece of ritual called Burushnum was an essential part ; but in this matter he was travelling outside anything necessary for the case before him ; and their Lordships do not find that Beaman J., the other Judge, concurred with him as to this, and they think that the evidence given in the present case warranted the decision to which the Chief Court came that this additional ceremonial was not necessary.

It follows therefore that the points which their Lordships have now to determine are whether the trusts of the Temple are for the benefit of all persons professing the Zoroastrian religion or limited to those who, professing that religion, are also racial Parsis in the sense in which that word is understood in the Parsi community ; and secondly, whether if Bella, not being a racial Parsi, is not a person within the benefits of the Temple Trust, this fact gives the plaintiffs any right of direct action against her and against her guardian.

The contention on behalf of the plaintiffs was the same as that of the contention of the defendants in the Bombay case, namely, that all these trusts were intended for Parsis in the limited sense, *i. e.* :—

"First.—The descendants of the original emigrants into India from Persia who profess the Zoroastrian religion.

"Secondly.—The descendants of the Zoroastrians in Persia who were not amongst the original emigrants, but who are of the same stock and have since that date, from time to time, come to India and have settled here, either permanently or temporarily, and who profess the Zoroastrian religion.

"Thirdly.—The children of a Parsi father by an alien mother, if such children are admitted into the religion of their fathers and profess the Zoroastrian religion."

Now the origin of the Temple, the right to worship at which is in dispute in the present case, is as follows :—

On the 24th November, 1868, the Deputy-Commissioner at Rangoon, on behalf of Her Majesty's Government, granted to Bajunji Cowasji and Sapurji Hirji a parcel of land in the town of Rangoon of a certain size "upon trust to build and maintain upon the said parcel of land a temple for the use of Parsi population."

It was provided that the Deputy-Commissioner might nominate new trustees, and that if a Temple was not erected within a year, he might revoke the grant.

On the 14th August, 1882—probably because there had been delay in building the Temple—a re-grant was made to

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new trustees upon trust for the same intents and purposes as the old grant, with like powers to appoint new trustees and a similar power of revocation if no temple was built within a year.

Previously on the 11th January, 1859, the then Deputy-Commissioner had granted to two Parsi gentlemen another piece of land upon trust to maintain it " as a cemetery and to the free use of persons of the Parsi denomination." There was a similar power given to the Deputy-Commissioner to appoint new trustees and a power of revocation in case the land was applied to other uses. This grant was again renewed also on the 14th August, 1882.

Some disputes having arisen as to the Temple, a suit was brought to have a new trustee appointed, and a scheme of management framed; and on the 20th March, 1889, the Recorder appointed Bajunji Cowasji sole trustee and ordered a scheme to be framed.

About the same time, a similar suit had been brought in respect of the burial ground, and by an order of the same date the same person was appointed trustee and a similar order to frame a scheme was made. The scheme in respect of the Temple gave the trustee charge of the Temple and its appurtenances with duty to manage and improve as funds permitted and power to build a range of shops on part of the trust lands, borrowing money for the purpose. After repayment of monies borrowed the rest was to be applied for the current expenses of the Fire Temple and the Parsi Burial Ground. In this way and to this extent the two properties were brought together.

When the scheme for the burial ground was to be framed, there was a serious dispute with regard to children of Parsi fathers who died without having gone through the ceremonies of initiation, and eventually the scheme was framed in the following words :—

"1. The burial ground shall be used for burying persons who shall at his or her death be actually professing the Zoroastrian religion and no other.

"EXPLANATION.—No one shall be taken to be actually professing the Zoroastrian religion who has not been duly invested with the Sudra and Kusti, in accordance with the rites prescribed by that religion, provided, nevertheless, that children born of fathers following the Zoroastrian religion, and brought up in that faith, and dying before the age of fourteen years and three months, without having been invested with the Sudra and Kusti, may be taken to be actually professing the Zoroastrian religion, but children dying after having attained that age without having been invested with the Sudra and Kusti shall

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not be taken to have professed the Zoroastrian religion unless his or her investiture was prevented by unforeseen and unavoidable circumstances."

It is suggested for the defendants that this document shows that the stress of the matter was laid upon the religion and not upon the race.

One other document must be mentioned. Apparently it took a long time before the Temple or at any rate the present Temple was built, and on the 20th August, 1904, Bajunji Cowasji executed a deed of declaration of trust reciting that he and his brother had built at their charge a fire temple upon the trust lands so that the same might form part of the said trusts and be for the use of the Parsi inhabitants of Rangoon, and purporting to declare for himself and his successors in office that he held the fire temple "for the use of the Parsi inhabitants of Rangoon free and unrestricted but subject notwithstanding to the tenets of the pure Zoroastrian religion and to the scheme prescribed by the Court."

The defendants at their Lordships' bar contended that this was an attempt to alter the trust and as such should be rejected, but in their written statement they accepted it as a valid document. So far as it goes, it rather makes in the plaintiffs' favour, but their Lordships are not disposed to attach grave importance to it.

The Chief Court—as already stated—considered that the effect of these documents was to impose a trust for the benefit of persons professing the Zoroastrian religion and no others.

Their Lordships agree with the latter part of this proposition. Parsis who cease to be Zoroastrians have, in their Lordships' view, no claim. But upon the whole and after much consideration they think that the benefits are confined to persons who possess the double qualification of Zoroastrians and racial Parsis.

The judgment in the Bombay case travelled over much ground—indeed, in their Lordships' opinion, much unnecessary ground—but both Judges came to the conclusion that the various trusts in that case must be construed as being confined to persons who were of the Zoroastrian religion and racial Parsis. There were several trusts, and the expressions in the deeds were different; but the word 'Parsi' never appeared in them, and the word 'Zoroastrian' or some equivalent religious word was used. Sometimes the trusts were for the members of the Zoroastrian community of Bombay; other phrases were similar. Nevertheless, both Judges came to the conclusion that they must be read as has been already stated.

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Davar J. thus expressed himself :—

"A Juddin" (that is a Gentile) "may become a Zoroastrian, but how he ever could possibly become a member of the 'Holy Zoroastrian Anjuman of Bombay' or be one of 'the members of the Zoroastrian community of Bombay' or become one of 'the Anjuman of the Mazdiasni faith' passes my comprehension. A Juddin converted to Zoroastrianism had never come into existence. Such a person could not possibly have been within the contemplation of the donors and founders; the possibility of such a being coming into existence would be so new and novel that if the donor ever conceived such an idea and intended to include him in his benefaction, he would certainly designate him separately and specially, and not include him in the general description of the community of his then existing co-religionists and their descendants."

Beaman J. said :—

"The question is not whether the Zoroastrian religion permits conversion, but whether, when these Trusts were founded, the Founders contemplated and intended that converts should be admitted to participate in them."

In their Lordships' view the same line of reasoning applies to the present case. The Parsi community had grown up to be such a distinct body, and admissions into it from outside had been so very rare, that at the time when these grants at Rangoon were made the Government must have intended that the Temple should be for the benefit of professing members of the Parsi community, *i. e.*, racial Parsis or people deemed after a long lapse of ages to be racial Parsis.

But this does not exhaust the matters to be determined on the present appeal. It determines that the respondent Bella has no right of entering into the Temple and may therefore be excluded or extruded from the Temple by the Trustees. They can treat her as a trespasser. But it does not follow that they are bound so to treat her. Still less does it follow that in an action to which the Trustees are not parties, and in which therefore no indirect remedy can be obtained, a direct claim can be supported as if for a tort committed by Bella or her guardian.

When property is set apart for public or charitable uses, it will be a malversation to apply any of the funds for persons who are not objects of the trust. Those who are objects of the trust must have all the benefits they require ; and if there is a surplus, it must be left to the Courts to make a cy-pres application of it. But when the subject-matter of such a trust or charity is the rendering of some convenience or service of such a nature that it will not hurt the lawful recipients if others share with them, their Lordships are aware of no case in which it has been held that the Trustees are bound to exclude persons who have no legal title to share. They may do so ;

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they may treat all such persons as trespassers and say : *Sic volo sic jubeo, stet pro ratione voluntas.* But if they choose to admit to the benefit of some park or garden established for a particular district some persons from over the border or to admit to a public library destined for a particular municipality persons from outside, or what is perhaps a nearer analogy, admit to the hearing of a lecture by a University professor persons not members of the University, this of itself furnishes no ground of complaint. If the numbers admitted are too large or the persons are disorderly or unpleasant in their habits or in any way substantially interfere with the convenience or benefit of those for whom the endowment was created, the Trustees may be required to exclude them. But the mere claim of A that B shall not share in such a benefit because B is not within the terms of the foundation is not one that Courts would encourage.

Many illustrations of this doctrine could be drawn from the history of English institutions. The great schools of Westminster, Eton and Winchester arose from small nuclei, namely, a fixed number of endowed and privileged scholars taught by appointed masters. They have become what they are because unprivileged boys in greater numbers have been allowed to benefit by the services of the appointed masters, and to use the school class-room and play-grounds.

The statutes of the colleges in Oxford and Cambridge make provision for the education of a fixed number of students or scholars privileged and endowed. Many, if not most, of them make no provision for the admission of other members in *statu pupillari*. But "commoners," so called, though their legal position is merely that of boarders [*Rex* v. *Grundon : Ex parte Davison* (2)], have been for several centuries admitted equally with the privileged scholars to the benefits of the colleges, particularly to the use of hall, library and chapel.

The intrusion of an unbeliever into a place of religious worship might well be a case of substantial interference with the devotions of worshippers. But the plaintiffs have failed to make out that Bella was not a Zoroastrian. They suggested indeed that her conversion was impossible, or at any rate that it had not been completed by due initiation; but their Lordships agree with the Judge of first instance that this suggestion was not established ; while, except in the evidence of one unsatisfactory witness, there was nothing to show that

2. Cooper's Reports, 319.

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Bella's presence would be thought to cause desecration, if once it was accepted that she was a Zoroastrian.

Also, if it were a question of caste and worshippers of a higher caste would be defiled by the presence of a lower caste, as in *Anandrav Bhikaji Phadke* v. *Shankar Daji Charya* (3) this would be a serious disturbance. As was said in that case :—

"This right is one which the Courts must guard as otherwise all high-caste Hindus would hold their sanctuaries and perform their worship only so far as those of the lower castes chose to allow them."

But this claim is again not established. Indeed, what may be called the quasi-caste claim is not even suggested in the pleadings. It is the wounding of religious feelings and the desecration of the Temple which are put forward.

Their Lordships have now to consider the relief which the plaintiffs have sought in this suit. They have not sought for a general declaration as to the persons who are objects of the trust. They have not sought for a construction of the scheme, or for any order to be made upon the trustee, nor have they made the trustee a party. For this they would probably have required the consent of the Advocate-General. They pray in the plaint " for a declaration that the defendant Bella is not entitled to the use and benefits of the Parsi Fire Temple in Dalhousie Street known as 'Captain's Agiary or Dhurraymair' or to the use and benefits of the buildings standing on the said trust land or to attend at or participate in any of the religious ceremonies performed therein."

Then they claim an injunction to restrain the defendant Bella from entering and the other defendant, now dead, from bringing her into the temple to attend the religious ceremonies. This is a claim for an injunction to prevent the repetition of an alleged trespass. It must therefore first be established that there was a trespass and one for which damages, though possibly only nominal, could be recovered. But for trespass upon land the only person to bring the action is the person in possession of the land, that is, the trustee. That a beneficiary or two or three beneficiaries of a trust for public purposes may bring a suit for trespass against an intruder is a novel principle of jurisprudence ; and the case is not made stronger by the suggestion that several other beneficiaries agree with them.

3. (1883) I L R 7 B 525.

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It may be that in India it would be convenient in some cases to allow such a suit, and the judgment in *Anandrav Bhikaji Phadke* v. *Shankar Daji Charya* (3) may form a precedent. But, if so, the circumstances must be as powerful as in that case. It must be established that the juxtaposition of the two sets of persons is so repugnant to their habits of mind that the entrance of one set into the Temple entails the departure of the other, so that it is as it were trespass to the person.

As already stated, no such case has been established, and therefore it is not necessary to discuss the principle on which the judgment in *Anandrav Bhikaji Phadke* v. *Shankar Daji Charya* (3) is founded and which was indeed accepted by the Judge of first instance in the present case. The facts do not warrant the claim, if it be a sound one, and no injunction can be granted.

With regard to costs, the learned Judge of first instance, while giving the defendants the general costs of the action, thought that both sides were to blame for the inordinate length of the Bombay commission and made the plaintiffs pay two-thirds only of the defendants' costs of the commission.

If any costs of the action were to be given, some similar provision should be applied. But, upon the whole, their Lordships feel that the plaintiffs have failed in the greater part of their suit, and that the giving to them of a declaration is an indulgence. They were given the costs of the preliminary issues before Young, J. and the costs of so much of the appeal as related to those issues. These they keep, and the orders against them in respect of other costs in the Courts below will be discharged, and there will be no costs of this appeal. Their Lordships will humbly recommend His Majesty that this appeal be allowed, that the judgment of the Chief Court be varied, and that a declaration be made, namely, that Bella was not entitled, as of right, to use the temple, or to attend or to participate in any of the religious ceremonies performed therein, that except as to the costs awarded to the plaintiffs in the Court of first instance, and in the Chief Court, there be no costs in the Courts below, and that there be no costs of this appeal.

Solicitor for appellants : *A. M. Bramall.*

Solicitors for respondent : *Waterhouse and Co.*

A. de M. *Appeal allowed.*

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3. (1883) I L R 7 B 323.

PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Bombay]

PRESENT :—LORD DUNEDIN, LORD SUMNER AND SIR JOHN EDGE.

Shafi Ahmed Nabi Ahmed and others ... *Petitioners**

v.

The King-Emperor ... *Respondent.*

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Shafi Ahmed v. King-Emperor.

Criminal Procedure Code, 1898, S. 527—Criminal charge—Comment by local newspapers prior to trial unfavourable to accused—Application to Viceroy for removal of place of trial refused—Prejudice to fair trial—Subsequent trial and conviction of accused—Application to Privy Council for special leave to appeal—"Substantial and grave injustice.......by a disregard of the forms of legal process, or by some violation of the principles of natural justice."

Where criminal charges were pending before the High Court at Bombay, and certain comments were made by the Bombay newspapers unfavourable to the prisoners, and application was accordingly made to His Excellency the Governor-General under S. 527, Criminal Procedure Code, to transfer the trial elsewhere, but the same was refused, and the prisoners were subsequently tried at the High Court, Bombay, before a Judge and Special Jury, and convicted on the charges, *Held*, that such refusal of the Governor-General, who had the advantage of being in the country and judging of the real state of public feeling, did not constitute, in the language of Lord Watson in *Rex* v. *Dillett*, 12 A C 459, "any violation of the principles of natural justice" to enable the Privy Council to entertain a petition from the prisoners for special leave to appeal from their conviction.

Similarly, the *adequacy* or *inadequacy* of the Judge's charge to the jury in a criminal trial, though furnishing a proper ground of appeal to a Court of Criminal Appeal, does not amount to "a disregard of the forms of legal process, or a violation of the principles of natural justice" to warrant the Privy Council in acceding to or entertaining an application for special leave to appeal by a prisoner convicted as a result of the trial.

Two petitions for special leave to appeal from the convictions and sentences of the High Court, Bombay (Crump, J. and a Special Jury), dated the 23rd March, 1925.

The petitioners were charged and convicted of having on the 12th January, 1925, in Bombay, engaged in an attack on one A. K. Bawla, paramour of Mumtaz Begum, in pursuance of a conspiracy to kidnap her from British India, and, in the act, murdered the said A. K. Bawla, and seriously wounded the said Mumtaz Begum, Lieut. Saegert and K. E. Mathew. Their petitions alleged, *inter alia*, that (1) the great public prejudice created against them in Bombay by the violent comments of the local newspapers prior to the trial, and the refusal by His Excellency the Governor-General to

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*5th November, 1925.

transfer the trial under S. 527, Criminal Procedure Code, had prevented them from having a fair trial ; (2) the identification by the witnesses for the prosecution of the petitioners as the real culprits was unsatisfactory and unreliable ; and (3) the verdict was against the weight of the evidence. P. C. Shafi Ahmed v. King-Emperor.

Sir J. Simon, K. C., Sir G. Lowndes, K. C., J. M. Parekh and *M. R. R. Pillai* for petitioners.

A. M. Dunne, K. C. and *K. Brown* for respondent.

The Board dismissed both petitions, and their reasons therefor were delivered on the 5th November, 1925 by

LORD DUNEDIN :—Their Lordships have repeatedly announced that in dealing with petitions for special leave to appeal against sentences pronounced in the Criminal Courts of the various Dominions of the King, they will not act as a Court of Criminal Appeal and will not, to use the words of Lord Watson in *Dillet's case* (1) advise His Majesty to "review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done." Lord Dunedin.

In the present case the first point urged by the petitioners is that there had been such copious and prejudicial newspaper comment on the crime committed that a fair trial by jury was impossible in Bombay.

It is in the power of the Governor-General of India if he thinks that in the state of public feeling a fair trial could not be obtained in the place where the offence would ordinarily be tried, to order that the trial be held elsewhere. An application was made to him to so order and was refused. To ask the Board to declare that such a refusal of the Governor-General, who had all the advantages of being in the country and of judging of the real state of public feeling, amounted to a violation of the principles of natural justice is nothing less than preposterous, and their Lordships cannot too strongly qualify the impropriety and uselessness of such a demand.

As regards the other grounds in the case of the first six petitioners, they are all questions as to the sufficiency of evidence—fit for consideration by a Court of Criminal Appeal, but falling far short of the definite dictum quoted.

The case of the remaining petitioner which at first sight might seem different, is, when more closely looked at, just the

1. (1889) 12 A C 459.

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same. He was not present at the scene of the assault and murder and consequently the offence of which he was found guilty was abetment of murder. The point that was sought to be urged by his counsel was that the charge of the learned Judge did not adequately bring home to the jury that abetment of murder could not be properly inferred from a conspiracy to kidnap unless the natural result of the attempt to kidnap was murder. The learned Judge in the course of his charge used these words after explaining S. 111 of the Penal Code :—

"I merely emphasise once more that the crucial point as regards the applicability of that section is whether that which is done was a probable consequence of the abetment ; was it a probable consequence of the conspiracy into which accused No. 9 had entered that Bawla would be murdered on the night of January the 12th ? Unless you can so find, that charge of murder cannot be established."

And he specially left it to them to say whether after finding conspiracy they " could go the length of saying that the probable consequence of the conspiracy was the murder of Bawla and the attempted murder of Lieutenant Saegert. " If this were a Court of Criminal Appeal it would be difficult indeed to say that this advice to the jury was not adequate to the situation. Still, it would be a question for a Court of Criminal Appeal. Here the moment that adequacy is raised in reference to such advice the case of the petitioners is gone ; for who could possibly say that the adequacy or otherwise could amount to a " disregard of the forms of process or violation of the principles of natural justice " ? The averment fails, just as the averments in the other cases failed.

Their Lordships will humbly advise His Majesty to refuse the prayer of all the petitioners.

Solicitors for petitioners : *T. L. Wilson and Co.*

Solicitor for respondent : *Solicitor, India Office.*

A. de M. *Prayer refused.*

PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Madras.]

PRESENT :—VISCOUNT HALDANE, LORD WRENBURY AND LORD BLANESBURGH.

S. Soundararajan and others ... *Appellants**

v.

C. M. Natarajan and others ... *Respondents.*

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Soundararajan v. Natarajan.

Hindu Law—Testator resident in Madras—Validity of bequest to unborn persons—Hindu Wills Act (XXI of 1870)—Hindu Transfers and Bequests Act ("Seshagiri Aiyar's Act") of Madras (I of 1914), S. 3—Powers of Madras

*P C Appeal No. 140 of 1923. 16th July, 1925.

Provincial Legislature—Indian Act (VIII of 1921)—Rule against perpetuities—Indian Succession Act (X of 1865), Ss. 101, 102 and 126—Majority Act (IX of 1875), as amended by Guardians and Wards Act (VIII of 1890).

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The will, dated 1897, of a Hindu testator, resident in Madras, who died in 1904, after directing the formation of a fund for the payment of a monthly sum to his widow for life, directed that his trustees were (*a*) to apportion the residuary trust funds into as many equal shares as he had daughters who were either living at his death or, having predeceased him, had left issue them and him surviving; (*b*) to pay the income of such shares to the respective daughters during life, and, after the death of each daughter, to hold her share aforesaid for her children who should attain 21 years; (*c*) if any daughter died without lawful issue, to hold the said share in trust for children of the other daughters who should attain 21 years; and (*d*) if a daughter dying in the testator's lifetime left lawful issue surviving the testator and attaining the age of 21 years, such issue were to take the share appropriated as aforesaid to the daughter as if she had survived the testator. Only some of the testator's grandchildren were born before his death. In a suit by some of the grandsons, after the death of the testator's widow and his three daughters, for the interpretation of the will, administration and declaration of the rights of the parties:

Held, (*i*) under S. 126, Succession Act (X of 1865) (which applies to the testator's will by reason of the Hindu Wills Act, XXI of 1870, and which embodies the principle laid down in *Lassence* v. *Tierney*, 1 Mac & G 551), where the will as a whole shows an intention to confer an absolute estate in the first instance on a legatee, and following on that absolute estate, there is a provision for settlement, which in the event cannot be operative, then the words of prior intention prevail, and the absolute estate takes effect notwithstanding the failure of the provision for settlement; but (*ii*) as cl. (*a*) of the will above set forth merely directed apportionment or division, and not distribution or disposition of the property, and cl. (*b*) effected the distribution, giving the daughters an income for life, followed by gifts to their children, the will did not confer upon the daughters any such absolute gift as is contemplated by S. 126 of the Succession Act, but only a gift for life; (*iii*) as to the later gifts in favour of the daughters' children, at the date of the testator's death in 1904, the vesting of the bequests to these children as a class *may* have been delayed beyond the period prescribed by S. 101 of the said Act (*i. e.* the lifetime of one or more persons living, and the minority, ending at 18 years of age, of some person who shall be in existence at the expiration of that period); hence, these bequests were void and inoperative under Ss. 101 and 102 of that Act; (*iv*) all questions to the powers and limits of the Provincial Legislature of Madras, and the validity of the Hindu Transfers and Bequests Act (I of 1914) ("Seshagiri Aiyar's Act") of that Legislature have now been set at rest by Act VIII of 1921 of the Indian Legislature, which has the effect of making the Succession Act (X of 1865), S. 101, now supersede the decision in *Tagore* v. *Tagore*, L R I A Supp 47, and make it applicable to the present will; and (*v*) by the operation of S. 5 of the said Act VIII of 1921, and the Majority Act, S. 33 (as amended by the Guardians and Wards Act, VIII of 1890, S. 52), the provision in the will fixing the age of 21 years in every case as the time for the vesting of the legacies contravenes the Succession Act (X of 1865), Ss. 101 and 102, and is void.

Appeal from a decree of the High Court, Appellate Jurisdiction, dated the 16th December, 1920 (Wallis, C. J. and

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Ramesam, J.) affirming a decree of the same Court, Original Jurisdiction (Coutts Trotter, J.), dated the 6th November, 1919.

The facts appear from the judgment of their Lordships and from the report of the prior proceedings in *Soundararajan* v. *Natarajan* (1).

A. C. Clauson, K. C. and *K. V. L. Narasimham* for appellants.

W. H. Upjohn, K. C., Sir W. Schwabe, K. C. and *A. M. Talbot* for respondents.

The arguments proceeded substantially on the lines respectively of those in the Court below [see *Soundararajan* v. *Natarajan* (1)] and their Lordships' attention was drawn to Act VIII of 1921 passed by the Indian Legislature since the date of the judgment under appeal.

16th July, 1925. The Judgment of the Board was delivered by

Viscount Haldane.

VISCOUNT HALDANE :—The questions which arise for decision on this appeal relate to the construction and validity of the provisions of a will, dated 27th April, 1897, and made by a Hindu, C. Ratna Mudaliar, who died in 1904. He left a widow and three daughters. One of these daughters, Yasodammal, died in 1907 ; and another, Rajammal, in 1908 ; and the third, Nilayathatchi Ammal, in 1918. Yasodammal had four children, as to three of them, two sons and a daughter, born before the death of the testator in 1904, and as to one of them, born afterwards in 1907. Rajammal, the second daughter, had a son Tirugnanasambandam, who was born in 1907. This child was constituted a Ward of Court in 1910. Nilayathatchi Ammal, the third daughter, had six children, three sons and three daughters, all born after 1904. Of these various families the three sons of the third daughter were plaintiffs in the suit and are appellants to-day. The others were defendants and are now respondents.

It will be convenient first of all to set out the material portions of the will :—

"I give devise and bequeath all my estate and effects immoveable and moveable unto my Trustees Upon Trust that my Trustees shall sell, call in and convert into money the same or such part thereof as shall not consist of money and shall with and out of the proceeds of such sale calling in and conversion and with and out of my ready money pay my funeral and testamentary expenses and debts and shall stand possessed of the residue of such proceeds Upon Trust

1. (1920) I L R 44 M 446 : 40 M L J 354.

to set apart thereout and invest in promissory notes of the Government of India such sum or sums of money as when so invested as aforesaid will produce by the income thereof a monthly sum of rupees one hundred and to pay such income monthly to my wife C. Andalammal during her life and from and after her decease to stand possessed of the said sum and the investments for the time being representing the same Upon the Trusts hereinafter declared concerning the residue of my estate. And as to the residue of my estate I direct that my Trustees shall at their discretion invest the same in any of the modes of investment in which trustees are by law authorised to invest trust funds and shall stand possessed of the said residuary trust moneys and the investments for the time being representing same (hereinafter called "the residuary trust funds"). In Trust to apportion the residuary trust funds into as many equal parts or shares as there may be daughters of mine living at the time of my decease or who having predeceased me shall have left issue her or them and me surviving and to pay the income of each of such equal parts or shares to my said daughters respectively during their respective lives. And from and after the decease of each of my said daughters to stand possessed of the share of the residuary trust funds so appropriated as aforesaid to such daughter Upon Trust for all the children of such daughter who shall attain the age of twenty-one years in equal shares and if there shall be only one such child the whole to be in trust for that one child and in the event of any of my said daughters dying without leaving lawful issue her or them surviving I direct that my trustees shall stand possessed of the share or shares so appropriated to her or them as aforesaid Upon Trust for all the children of the other or others of my said daughters who shall attain the age of twenty-one years as tenants-in-common in equal shares *per stirpes*. Provided always and I hereby declare that if any daughter of mine shall die in my lifetime leaving lawful issue at the time of my death such issue as shall attain the age of twenty-one years shall take and if more than one as tenants-in-common in equal shares *per stirpes* the share which would have been so appropriated as aforesaid to such daughter of mine and her issue if she had survived me."

The suit was instituted in the High Court of Madras for a due construction of the will and for administration. The plaintiffs, the present appellants, were, as already stated, grandsons of the testator and children of his third daughter. Their case is that they, along with the sons of the other two daughters, are entitled to succeed to the testator's residuary estate subject to an annuity to the widow and to mere life estates given to the three daughters, who are all now dead. For they contend that the trusts in favour of grandchildren, following in the will on those for the daughters for life, are void by the law of India. The case of the respondents, on the other hand, is that the trusts introduced in favour of grandchildren were validly created by the will, or, alternatively, that the three daughters of the testator in the result took his residue absolutely.

The case was tried before Mr. Justice Coutts Trotter, who decided in substance (1) that the testator gave only a

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life estate to each of his three daughters, and not an absolute estate, remarking : "It seems to me clear that what the testator wished to do was to divide the income of his estate into three shares for the benefit of his three daughters respectively during their lifetime, and thereafter the corpus of each share should belong to such of the children of each daughter as should attain the age of twenty-one years"; (2) that under the provisions of S. 3 of the Hindu Wills Act, 1870, and the rules laid down by the Lords of the Judicial Committee in the case of *Tagore* v *Tagore* (2) and other decisions, the gifts to the grandchildren of the testator born after his death were void ; but that the provisions of the Madras Act I of 1914, which were not in his opinion *ultra vires* of a Provincial Legislative Council, validated the bequest in this respect. The learned Judge was further of opinion that the testator's will did not, for reasons which he gave, contravene the Indian rule against perpetuities in view of the provisions of Act IX of 1875, as amended by the Guardians and Wards Act, 1890.

There was an appeal to the Appellate Civil Jurisdiction of the High Court of Judicature at Madras. Before judgment on that appeal was delivered certain compromises were made between certain of the parties, for the division between them of what might be the fruits of this litigation. Into the terms of the compromise it is not, however, necessary, at this stage of the suit, to enter.

The appeal was heard by the Chief Justice (Sir John Wallis) and Mr. Justice Ramesam. These learned Judges did not agree with the view of the Trial Judge as to the effect of the Indian Majority Act, 1875, and of the Madras Act, I of 1914 (which they held to have been *ultra vires* of the Provincial Legislature). They were accordingly of opinion that the disposition of the will could not take effect as regards beneficiaries born after the death of the testator, and, as the provisions in favour of issue of daughters were obnoxious to S. 101 of the Indian Succession Act, 1865, they thought that the whole disposition in favour of the daughters' children failed as a result of S. 102 of that Act. They held, however, that upon the true construction of the will the intention of the testator was, in the first instance, to make an absolute gift in favour of each of his three daughters, the provisions which followed being a mere settlement of the gift thus absolutely made, and that consequently under S. 126 of the Indian Suc-

2. (1872) L R I A Suppt 47.

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cession Act, 1865, the daughters of the testator took absolutely, when these provisions failed of effect. That section, made applicable to the testator's will by the Hindu Wills Act, XXI of 1870, is as follows :—

"Where a testator absolutely bequeaths a fund, so as to sever it from his own estate, but directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified benefit for the legatee; if that benefit cannot be obtained for the legatee, the fund belongs to him, as if the will had contained no such direction."

This is an enactment in statutory form of a principle which was already familiar to English lawyers. The case of *Lassence* v. *Tierney* (3) shows that where, reading the will as a whole, the intention to confer an absolute estate in the first instance is expressed or implied, and following on that absolute estate there is a provision for settlement which in the event cannot be operative, then the words of prior intention prevail and the absolute estate takes effect notwithstanding the failure of the provision for settlement that follows. In India the words in S. 126 must be followed as laying down the principle, but the principle is not substantially different from what was expressed in *Lassence* v. *Tierney* (3). Their Lordships have given consideration to the terms of the will in the present case. The material directions are those to the trustees "to apportion the residuary trust funds into as many equal parts or shares as there may be daughters of mine living at the time of my decease or who having predeceased me shall have left issue her or them or me surviving." The trustees are then to "pay the income of each of such equal parts or shares to my said daughters respectively during their respective lives. And from and after the decease of each of my said daughters to stand possessed of the share of the residuary trust funds so appropriated as aforesaid to such daughter upon trust for the children of such daughter who shall attain the age of 21 years." The testator then directs that in the event of any of the daughters dying without leaving lawful issue the trustees are to "stand possessed of the share or shares so appropriated to her or them as aforesaid" on trust for her children who shall attain twenty-one. He goes on to introduce a proviso under which, if a daughter dies in his lifetime leaving lawful issue, such issue as shall attain twenty-one years are to take the share "which would have been so appropriated as aforesaid to such daughter of mine and her issue if she had survived me."

3. (1849) 1 Mac & G 551.

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Reading the will as a whole their Lordships are unable to agree with the conclusion about the construction of these clauses come to by the Court of Appeal. They think that the first trust for apportionment directs merely division of the fund into as many equal parts or shares as there are daughters living at the testator's death, or sets of issue then living of daughters then dead.

The words of apportionment are introduced for merely arithmetical purposes and so far do not dispose of property. In order to find the interest given under the will it is necessary to proceed to the further words, and these, in the case of a daughter, confine her interest to a right to income for life. They are followed by words of disposition in favour of the children and issue. This view of what may be called the apportionment clause is even more apparent as regards the suggested gift to issue of a deceased daughter. There is no unqualified gift to them by the apportionment clause. The effective gift in the later words of the will is to such of a deceased daughter's *children* as attain 21. And if, of this will it could be said that the testator had used the words "issue" and "children" interchangeably then the limitation to such children only as attained 21 would, if there were a prior gift to them without that qualification, be merely otiose. If so much cannot be said then there is no room for the operation of the rule. Their Lordships are, therefore, unable to find in this will the absolute bequests required by S. 126. They think that the three daughters took only for life, and that it must remain to be seen whether the later gifts in favour of their children or other issue are validly made under Hindu Law.

Turning to this question, the first observation to be made is that the will has apparently been drawn by some one familiar with English Law, but not with the Indian statutes which apply. If it were only a question of the English rule against perpetuities, there would be no objection to the will. But there comes in S. 101 of the Indian Succession Act of 1865. Under this section no bequest is valid whereby the vesting of the thing bequeathed *may* be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority (ending at 18) of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the thing bequeathed is to belong. The validity of the gifts now in question must be scrutinized as at the death

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of the testator, *i. e.*, 1904, and if S. 101 then applied the disposition subsequent to the lifetime of the testator's daughters was invalid, for the children of the daughters take only in classes, and by S. 102 of the Succession Act, if a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules contained in S. 101, the bequest is wholly void. It being plain that this bequest, tested as at the testator's death, made delay beyond the lifetime of the daughters and the minority of some of their children possible, the bequest in favour of the children was inoperative. It was suggested, however, that this section had no application to the will of a Hindu by reason of the fact that, as is shown by the *Tagore* v. *Tagore* case (2), any disposition in such a will is invalid if the disponee is an unborn person at the testator's death. The section, it was said, is only applicable to dispositions which are not otherwise ineffective. One answer to this was that in 1914 the Madras Act above referred to was passed which purported to get rid of the difficulty caused by the *Tagore* v. *Tagore* (2) decision. This Act provides by S. 3 that a disposition shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer, or the death of the testator. Questions were raised, as has already been observed, in the Courts below as to the validity of the Madras Act, but these questions are now superseded by the Act of the Indian Legislature, VIII of 1921, which has validated the law contained in the Madras Act, and repeats in S. 5 a provision identical with S. 101 of the Succession Act, 1865. The result is to make that section applicable to this will, upon a view which was not contested before their Lordships if the Madras Act or the Act of 1921 were treated as operative. Now in that section, as has been already said, a " minor " means any person who shall not have completed the age of eighteen years. It was, however, pointed out by the respondents that, by the Majority Act, 1875, every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Indian Succession Act or in any other enactment, be deemed to have attained his majority when he shall have completed his age of 21 years and not before; and this is accompanied by a provision that every other person domiciled in British India shall be deemed to

2. (1872) L R I A Suppt 47.

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have attained his majority when he shall have completed his age of 18 years and not earlier. These provisions do not, however, in the opinion of their Lordships, help the respondents. At the testator's death—for this purpose the relevant date—it was not clear, and could not be certain, whether all or any of the members of the classes in whose favour the disposition was made would ever have guardians appointed. The provision of the will fixing 21 in every case as the age of vesting was, therefore, in contravention of S. 101, and the whole gift is invalid under S. 102. Their Lordships are unable to agree with the views expressed in some detail on this point by the learned Trial Judge.

Their Lordships are of opinion, for the reasons they have given, that the appeal must succeed. There will be a declaration that the appellants are entitled to their respective shares in the property in suit as upon an intestacy, subject to the life estates (now at an end) in favour of the testator's daughters. This will be without prejudice to the compromises referred to in the decree appealed from, and to the sanction given to them by that decree. The case must go back to the High Court for further inquiry on that footing. Their Lordships do not think it necessary to interfere with the orders as to costs made in the Courts below. They think that the costs of this appeal should, in the same way, be payable out of the estate.

They will humbly advise His Majesty accordingly.

Solicitor for appellants : *H. S. L. Polak.*

Solicitor for respondents : *Douglas Grant.*

A. de M. *Appeal allowed.*

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